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REPORTS OF CASES
ADJUDGED IN THE
SUPREME COURT

—OF—

PENNSYLVANIA:

WITH SOME SELECT CASES

—AT—

NISI PRIUS, AND IN THE CIRCUIT COURTS.

BY THE HON. JASPER YEATES,

ONE OF THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA.

VOL. IV.

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CASES OVERRULED OR MODIFIED

IN VOL. IV. YEATES.

[Supplied by WM. DUANE Esq., of the Philadelphia Bar.]

JONES v. ANDERSON, 569.

The first position in this decision is overruled in *Cosby v. the lessee of Brown*, 2 Binney 124; and the remainder of the decision is overruled in *Young v. Beatty*, 1 S. R., 74.

See *Carr. v. Wallace*, 5 Watts, 394.

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SUPREME COURT

OF

PENNSYLVANIA.

DECEMBER TERM, 1803.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

STEPHEN GIRARD *against* EDWARD STILES.

Court will not amend the verdict of the jury, unless on sure grounds. Nor will they amend the damages laid in the plaintiff's declaration after verdict, without sending the cause to a new trial.

THE plaintiff declared in covenant, and laid his damages at \$2000. On a trial this term, he obtained a verdict for \$2856³³/₁₀₀, and Mr. Blair, for the defendant, entered a motion in arrest of judgment.

Mr. Ingersoll, for the plaintiff, now stated and verified the following facts to the court :

A former action was brought by Stiles against Girard, on a lease (the foundation of the present suit) for rent, to March term 1798, on which it was agreed, that new actions should not be brought. A trial was had therein and a verdict for the plaintiff taken by consent. The judgment entered thereon was afterwards carried up to the High Court of Errors and Appeals, and there confirmed.

On the 1st July 1802, the counsel on both sides signed a written paper, to enter the present suit as an amicable action in covenant, as of March term preceding.

And on the 21st September 1802, they entered into another agreement, that this suit should be tried on the general issue of covenants performed ; the replication to state as a breach the landlord's not allowing for certain buildings, and some "disputed items of account," so as to ascertain the general balance of accounts between the parties.

On the 28th of the same month of September, Mr. Dickerson, the attorney for Stiles, pressing for the money he had recovered,
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he and Girard, signed another paper explanatory of the last agreement, wherein it was expressed, that the words "disputed items of account," mentioned in the agreement of 21st September last, include any over-payments and mistakes in the judgment obtained by Stiles against Girard for \$3660, on the 21st September 1801. In consequence whereof, Girard paid the money to Mr. Dickerson for the use of Stiles.

The declaration in the present cause having been drawn before the agreements in September, though marked filed on the 22d September 1802, Mr. Ingersoll now moved the court, to model the verdict in such a manner, as to separate the sum due strictly on the lease from the sum due on the two agreements, according to the evidence given to the jury; and enter the former sum as the verdict on the lease, and the latter as the verdict on the agreements which according to his calculations, would result as follows:

A verdict to be entered for \$1503 60, the damages on the declaration; and for \$1352 78, the damages on the agreements; making the amount of \$2856 38 in the whole. Or if the court should deem it more expedient, he moved, that the damages in the declaration might be increased from \$2000 to \$3000.

In support of his motion he urged the following authorities: The *postea* may be amended by the judge's notes at any time even after final judgment, and a writ of error brought. 3. Term Rep. 749. And another strong case of amendment occurs in the same book, page. 349. Nor have the courts of justice in this state, been backward in directing amendments. In *Burrows v. Heyshan*, 1 Dall. 134, the president of the Common Pleas, (now chief justice,) declared, that on the liberal principles of modern practice, and indeed for the honor of common sense, it was incumbent on the court to direct that a *scire facias* should be amended by the record, after the judgment was removed by writ of error. And he there cited *Galbraith's lessee v. Scott*, *Scott v. Galbraith*, where this court directed the amendment of a verdict, though there was nothing to amend by. In *Tomlinson et al. v. Blacksmith*, 7 Term 132, a declaration was amended after verdict, by amending the damages laid, but a new trial was granted to enable the defendant to make his defense to the demand so enlarged. In the principal case there could be no surprise; the defendant was perfectly acquainted with the objects of the plaintiff's suit. Lord Kenyon has remarked, that these amendments are not reducible to any certain rules; and each particular case must be left to the sound discretion of the court. The best principle is, that an amendment shall or shall not be permitted to be made, as it will best tend to the furtherance of justice.

Mr. Blair for the defendant declined giving any consent to either of the amendments prayed for. His client had come to trial, without due preparation on several material parts of his case.

The court declared, that they were strongly inclined to treat the plaintiff's motion with the utmost liberality, but were not disposed to make new precedents. They continued the matter under advisement for a few days.

Afterwards the court said, they had considered both points fully, and were sorry that notwithstanding their personal feelings, they were obliged to refuse the motion. It appeared from the notes of the trial, that the whole sum demanded was not recovered; and they could not possibly discriminate between what was found due in the action of covenant, and on the agreements. It would therefore be an unwarrantable liberty to enter up the verdict in the manner required.

The observation of Lord Kenyon, in 7 Term Rep. 133, forms a full answer to the remaining part of the motion. It would be going too far to make the amendment required, without sending the cause to a new trial; as the defendant might have gone to trial, relying that no more than \$2000, could be recovered against him.

Mr. Ingersoll then agreed to set aside the verdict, and that a new trial should be granted, on his obtaining leave to make the amendment in the declaration, which the court granted, without hesitation.

SAMUEL VANLEAR *against* GEORGE VANLEAR.

New trial awarded on a feigned issue respecting the validity of a will, on the dissatisfaction of one of the judges who tried it. On an appeal from the Circuit Court, counsel shall generally be confined to the reasons subscribed by them, but the rule admits of exceptions.

THIS was a feigned issue to try the validity of a certain writing, purporting to be the last will of Dr. Branson Vanlear. The cause was tried at West Chester, on the 30th May 1801, and a verdict had, finding for the plaintiff, and thereby establishing the will.

The defendants's counsel moved the court, to grant a new trial on the following grounds: 1st. That the defendant was sick and unable to attend. 2d. The defendant had material testimony to produce, but he was prevented therefrom by indisposition. 3d. The trial was urged on by the plaintiff by surprise. And 4th. The verdict and judgment thereon would preclude the defendant from inquiry into the point at a future day.

The defendant not being present, and no agent conducting the cause for him present, to verify the three first grounds, the court, consisting of Shippen, C. J. and Smith, J., refused the motion; and the defendant appealed from the decision of the Circuit Court by his counsel.

It was now stated by the defendants counsel, that the defendant, after having received the proper instructions to prepare for his defence, became suddenly deranged in his intellects and was confined as a lunatic in the city hospital, three weeks before and during the trial, of which his counsel were wholly ignorant, until their return Circuit; and the same was offered to be proved. The trial was had almost *ex parte*; and the probate of the will would be undeniable evidence to a jury. 1 Ld. Ray. 262. This was in fact condemning the party without a hearing.

This testimony was opposed by the opposite counsel.—The court here on the appeal, must take up the cause and proofs, as they appeared before the Circuit Court, and rectify their error, if any has been committed. For this reason, the Circuit Law, (4 St. Laws, 364,) in the fourth section, has provided, that no appeal shall be available, unless the counsel for the appellant shall state in writing his reasons for the appeal, and subscribe his name to the same certifying his belief, &c. This provision is rendered nugatory, and surprise is affected, if the party can be let into new grounds, unknown to his adversary. Besides the “act to establish the judicial courts of this commonwealth, in conformity to the alterations and additions in the constitution,” passed 13th April 1791, (3 St. Laws, 98,) in the 81th section directs, that “if an issue be sent from the Register’s Court to try the facts of any cause, litigated before them, and a verdict establishing the said facts be returned, the said facts shall not be re-examined on appeal.” Here the will was substantially proved by two witnesses, according to the act of assembly of 1705. 1 St. Laws, 53.

Yeates, J. said, that the clause in the act of 1791, which had been cited, related to appeals on litigated wills to the High Court of Errors and appeals, and the words “a verdict establishing the said facts be returned,” implied a judgment entered thereon. It had been fully settled in this court, that on an issue to try the validity of a will, the court before whom it was tried, and not the register had the power of awarding a new trial.

It must be considered as a good general rule, that a party on his appeal from the Circuit Court should be confined to the

reasons he there urged; but it was not universal, and could not possibly comprehend exceptions and grounds unknown at that time. Suppose in such a case as the present, it could be made appear to this court, that the plaintiff had tampered with and kept back from the trial material witnesses of his adversary, which the counsel were then wholly uninformed of, ought not we to receive the evidence of the foul fact, and act accordingly? And can we say, that the act of God in his visitation of an unhappy man with lunacy, should have the injurious effect, of condemning him unheard? For as to him, the probate of the will would be conclusive, at least so far as it respects the personal estate.

If the statement which has been made, is admitted to be correct, the court would gladly know what appeared on the trial, from the notes of Judge Smith.

Mr. Justice Smith then made a full statement of the evidence, the outlines of which were these:

The deceased quit his own home in Chester county, 1798, and went to Philadelphia, flattering himself he had discovered a cure for the yellow fever. The paper in question, bore date on the 20th June 1798, and he died in the month of September or October following of the yellow fever. The paper was attested by two subscribing witnesses who were not in habits of intimacy with Vanlear, and who lived remote from him, in a different part of the city, and they both died of the yellow fever in the same year. The body of the paper was not in the hand-writing of Vanlear, but three witnesses swore to his signature. The hand-writing of one of the witnesses was established; but the hand-writing of the other, named —Logue, was much questioned.

The charge of the chief justice was in favor of the writing as a will; but Smith, J. added, that on the most mature reflection, he was not satisfied with the decision of the jury, and thought the case required another hearing.

The counsel submitted the case to the court.

Per cur. We wish not by our remarks to prejudice the plaintiff's cause. Let there be a new trial; it will give more general satisfaction.

Messrs. M'Kean and Hemphill, *pro quer.*

Messrs. Ingersoll and T. Ross, *pro def.*

PENMAN against GARDINER.

In a foreign attachment, plaintiff may be called upon to show his cause of action, though after the third court. Fictions of law shall work no wrong.

FOREIGN attachment returnable to March term 1803.

Mr. Todd, for the defendant, moved, that the plaintiff should show his cause of action. He stated that he had given notice to the plaintiff's attorney, at the beginning of the term of his intended motion.

This was admitted by Mr. Moylan, for the plaintiff, and that the judgment was entered, subsequent to such notice. He insisted that he had a right to enter his judgment at the third court, according to the act of assembly, which related to the first day of the term. The defendant's motion therefore came too late, according the case of *Whiteside v. Oakman*. 1 Dall. 294.

Per cur. Fictions of law shall work no wrong, (Hob. 311. 3 Burr. 1243.) and therefore the present motion must be considered as if made at the time of notice, and before the judgment entered.

The general rule laid down in 1 Dall. 294, we adopt. But there certainly may be just exceptions to it, in some instances which may be put. Suppose a foreign attachment levied, which is wholly unwarranted, of which the defendant should have no notice till judgment was obtained, and he should immediately apply to the court, would not the court grant him redress?

In the present case, rule that the plaintiff show his cause of action.

DANIEL SMITH esq. *against* JOHN NICHOLSON, esq.

Settlements of a public account entered in the books of the comptroller general and register general, create a lien on all the real estate of the debtor within the state.

A TESTATUM *fi. fa.*, issued from this court to Lycoming county, in this cause; upon which the sheriff returned, that he had levied on a tract of land, surveyed in the name of John M'Micken, on the 12th February 1798, late the property of the defendant.

John Nicholson, esq., the above defendant, being a debtor to the commonwealth on various accounts, one of his accounts, on which the sum of \$58,429 24, was due to the commonwealth, was settled and entered in the books of the Comptroller General, on the third day of March 1796, and settled and entered in the books of the Register General, on the eighth day of March 1796; but the same were not transmitted, and received no confirmation from the governor.

A question was stated for the opinion of the court, whether the said settlement created any lien on the real estate of the said John Nicholson?

The case was argued by Mr. M'Kean, the attorney general in behalf of the commonwealth, and by Messrs. E. Tilghman, Rawle and Dallas, for the creditor.

The attorney general detailed the several acts of assembly, which bore on the present question.

The first act which passed on the subject, was that establishing the comptroller general's office, and defining his jurisdiction on the 13th April 1782. 2 St. Laws, 44. By this law no lien was created in favor of the state.

The act of 18th February 1785, (*lb.* 247,) gave a trial by jury on an appeal from the settlement of accounts by the comptroller general. By § 12, "a settlement by the comptroller general and confirmation of the account by the Supreme Executive Council, shall be a lien on all the real estate of any person found indebted to the state; and if the settlement shall be confirmed in the Supreme Court on an appeal, interest shall be awarded from the date of the confirmation of the said settlement of account by the Supreme Executive Council." The lien is declared to be on all the debtor's lands in the state, as if judgment had been given in favor of the commonwealth, against such person, for such debt, in the Supreme Court.

The act for giving the Supreme Court original jurisdiction in the city and county of Philadelphia, was passed on the 25th September 1786. (*lb.* 471.)

The act for the appointment of a Register General for the purpose of registering the accounts of the state, passed on the 28th March 1789. (*lb.* 704) § 3. The comptroller general is thereby enjoined, to submit all accounts which he shall thereafter adjust, to the inspection and examination of the said Register General; and their settlements and statements of public accounts shall be laid before the Supreme Executive Council, "in the same manner, and for the same purposes," as is provided by the laws then in being as to accounts to be settled by the said comptroller general.

The supplement to the last act, passed on the 30th September 1789 (*lb.* 751,) provides by the 2d section that the public accounts after settlement and allowance by the Comptroller and Register General, should be laid before the Supreme Executive Council "in the manner and for the purpose mentioned in the 3d section of the last act.

The act to enforce the due collection of the revenue of the state, passed on the 1st April 1790 (*lb.* 787.) The 4th section provides,

that the future public accounts shall be first liquidated and adjusted by the Register General, then transmitted to the Comptroller General, who having examined and approved the same, shall transmit them to the President and Supreme Executive Council, for their final approbation, and shall then be returned to the Register General. And by the 5th section, it is declared, "that all such settlements of accounts shall have the like force and effect, and be subject to the like appeal, at the instance of the party, as settlements theretofore made by the Comptroller General."

By the acts of 14th January 1791 and 13th April 1791 (1 St. Laws, 73) all the powers which were theretofore vested in the Supreme Executive Council, or in the president or vice president thereof, are directed to be exercised by the governor, until the end of next sessions.

And by the act of 21st September 1791, (*ib.* 113) the former law was extended to the first day of December next, and until the end of the next session of general assembly. (After two more continuances the act was made perpetual. (*ib.* 186. 375. 591.) But it provides "that in all cases, where accounts examined and settled by the Comptroller General and Register General or either of them, have heretofore been referred to the executive authority, to be by the said executive authority approved and allowed, or rejected, the same shall only for the future be referred to the governor, when the said Comptroller General and Register General shall differ in opinion; but in all cases when they agree, only the balances due on each account shall be certified by the said Comptroller General and Register General to the governor, who shall thereupon proceed in like manner as if the said accounts respectively had been referred to him, according to the former laws upon the subject." It then gives the appeal as heretofore.

The act to provide for the settlement of public accounts was passed 4th April 1792. (*ib.* 218.) The 1st section directs, that all public accounts (except between the United States and this state, and monies due to the state for land, and due in the loan offices of 1773 and 1785) shall be first liquidated and adjusted by the Register General, and then be examined by the Comptroller General, who if he shall approve the same, shall return them with his approbation to the Register General; but if he shall disapprove, he shall give his reasons in writing to the Register General; if they cannot then agree, he shall transmit the same with his objections to the governor, who after hearing the reasons of the Register General, shall decide, as the nature of the case may require, &c. When the party is dissatisfied with the settlement of his accounts, or when there is reason to suppose that justice has not been done to the state, the governor

may and shall allow appeals, or cause suits to be instituted as the case may require.

The 2d section directs how the accounts shall be entered in the books, and that the papers and vouchers shall be filed in the office of the Comptroller General; and how warrants and certificates shall be issued.

By the 3d section, certificate of balances are to be reported by the Register General to the legislature in the first week of each ensuing session.

By the 4th section, the Comptroller General is to make out a balance sheet, &c. and on the 1st July 1792, he and the Register General are to open regular books, &c.

By the 5th section, the Comptroller General is vested with summary powers to compel delinquents to account and pay the public monies in their custody.

By the 6th section, the State Treasurer and Register General are to deliver all accounts and vouchers by them respectively settled, to the Comptroller General.

The 7th section repeals so much of the act of 1st April 1790 as relates to the duty of the State Treasurer, in examining and cancelling certain certificates.

And the 8th section directs, that the State Treasurer shall deliver to the Register General quarterly, all certificates paid in from the land office.

The 9th section prescribes the mode of election of the State Treasurer annually, and that the Comptroller General and Register General be respectively appointed by the governor, subject to removal on the address of both houses.

By the 10th section, the Register General is to exhibit to the legislature an annual statement of the finances of the commonwealth, and the State Treasurer, a full and correct annual statement of his accounts.

And lastly, by the 11th section, "so much of every act of general assembly, as is thereby altered or supplied, and no more, is thereby repealed."

The act to provide for the settlement of the accounts of John Nicholson, late Comptroller General, was passed on the 20th April 1795. 3 St. Laws, 790. It directs, that the present Comptroller General shall employ two accomptants to settle his predecessor's accounts, and make report thereof to the next session.

The question then is, whether the settlements made by the Comptroller and Register General of the defendants, operate as a lien on his lands, generally?

That settlements by the Comptroller General, when confirmed

by the Supreme Executive Council, produced this effect, under the express words of the 12th section of the act of 18th February 1785, was clear beyond all doubt. They bound all the real estate of the debtor within the state, as if a judgment had been given in the Supreme Court. And it has been determined here, in *White v. Hamilton*, that such judgments on removals, prior to the law giving to the Supreme Court original jurisdiction in the city and county of Philadelphia, were liens on all the defendant's lands within the state. The Circuit Law of 20th March 1799, § 14, (4 St. Laws, 367,) directs prospectively, that after the last day of December term 1799, no judgments rendered, either in the Supreme or Circuit Courts, shall be a lien on real estates, excepting in the county, in which such judgment shall be entered. But this law can have no effect on the point in question. The law of 28th March 1789, directs, that settlements made by the Register and Comptroller General, shall be laid before the Supreme Executive Council, "in the same manner and for the same purposes." And the law of the 1st April 1790, in the 5th section provides, that all such settlements "shall have the like force and effect, as settlements theretofore made by the Comptroller General."

When the new state constitution came into operation, the powers formerly vested in the Supreme Executive Council, were first devolved on the governor by an act of the 14th January 1791, for a time, which was afterwards extended by the acts of 13th April 1791 and 21st September 1791. By this last law, accounts were no longer to be referred to the governor for his approbation or rejection, except in those instances, where the Comptroller General and Register General should differ in opinion. The liens on the lands of public debtors are not taken away, either expressly, or by any necessary implication. The act only varies the form, but does not change the substance or effect of such settlements. If it be asked, from what period interest is to be calculated on a confirmation of the account on an appeal to the Supreme Court, the governor's approbation being no longer necessary? The answer is ready; from the time of the final settlement. As to certifying to the governor the balances due to individuals, it never was the official usage. The access to the offices of the Comptroller and Register General, was equally easy as to that of the secretary of state, for those whose interests would lead them to enquire of these liens; and no inconveniences could result from the variation of the form of settlement.

But it will be urged on behalf of the plaintiff, that the act of 4th April 1792, is a virtual repeal of the lien, created by the act of 18th February 1785. It is answered, that it never was designed to produce this effect; for it is expressly provided by the

11th section, that so much only of former laws, as is thereby altered or supplied, is thereby repealed. The governor is only to interpose in a certain manner between the Comptroller General and Register General, where they cannot agree. As to other cases, their decisions where they do agree, unless in the cases of appeal, are conclusive. This law of 1792, has no negative words; nor is it inconsistent with the act of 1785, as to the point in debate, according to the rule laid down in Foster's case. 11 Co. 63, *a.* 1 Ld. Ray. 160. 2 Wils. 146. The former acts continue in force, unless so far as they are altered or supplied by the latter law; and all of them made *in pari materia*, must be considered together and expounded as one act. Doug. 80, 1 Burr. 447.

The plaintiff's counsel readily agreed, that all the acts on the subject were to be taken together, in order to form a correct judgment of the intention of the legislature. From a strict attention of their language, their meaning was to be collected.

Cases of lien are matters *stricti juris*. They should always be clear and positive, and never rest on intendment. Judgments and mortgages might be discovered with due diligence; but it would not readily occur to any one to search the office of the Comptroller General, for incumbrances. Liens of this secret nature are highly inconvenient to honest creditors. Here the lien contended for, is supposed to have been created by the state in her own favor, and should therefore be narrowly watched.

It is admitted, that the legislature may establish such a lien, and also abolish it. It was at one time established by the law of 18th February 1795, but the confirmation of the account by the Supreme Executive Council, was an indispensable term, and prerequisite. The lands of the debtor were not bound, unless the settlement was thus confirmed. The act of 13th April 1782, raised no lien on a settlement. The act of 28th March 1789, pursues the spirit and intention of the act of 1785; and directs, that the settlements should be laid before the Supreme Executive Council, "in the same manner and for the same purposes," as is provided by former laws. So by the act of the 1st April 1790, the settlements thus confirmed, are to have the "like force and effect" as former settlements by the Comptroller General. Under every change of the accounting department, the lien is thus preserved, on a concurrence of the prerequisites. Not so of the act of 21 September 1791, which was a mere temporary law, continuing in force, little better than six months, and made in case of the governor. He was a single person; the Executive Council was composed of many; and yet his interposition was essential, when the Comptroller and Register Gen-

eral differed in opinion. When they did agree, they were to certify only the balances due on each account to the governor, who was to proceed thereon. Nothing of that kind was done in the present instance; and it is in vain to speak of official usage, against the clear decided terms of an act of the legislature. But it is remarkable, that the expressions in the former laws, "in the same manner, and for the same purposes,"—"the settlements to have like force and effect," &c, are wholly dropped, and we must suppose intentionally.

This is still more obvious in the act of 4th April 1792, which goes into all the minutiae of a general and comprehensive system, providing for the settlement of public accounts. Not a syllable occurs respecting the lien, even when the summary powers of the Comptroller General to enforce payment from delinquents are detailed. May we not fairly infer, that some spark of the same spirit which dictated the law of 19th April 1794 (directing the order in which the debts of deceased persons should be paid, and providing that debts due to the commonwealth should be last paid, 3 St. Laws 527, § 14) influenced the public councils, to change the former system of policy? If it was intended the lien should have effect, would it not have been preserved by express words? On the 3d April 1794, the law passed for the sale of all the vacant lands within this commonwealth, (3 St. Laws 209) and it would be unreasonable and inconvenient, that the lien on all lands should be continued against the debtors.

It is not practicable to execute the provisions of the act of 18th February 1785, when the confirmation of the settlement by the executive is taken away: For it is clear, that no day can be ascertained, from which interest can be computed, on the settlement being confirmed by the Supreme Court on appeal, unless an unwarrantable liberty is taken with the law, by a substitution of other words to suit the particular case. If the court should even think the present to be *casus omissus* they will not venture to supply it.

The court declared, that they saw no great difficulty in the question submitted to the court in the present case.

No doubt can be entertained, that a general lien was created, by the settlement of an account by the Comptroller General, when it received the approbation of the Supreme Executive Council, under the law of 18th February 1785. When the powers of this council became vested in the governor, by a temporary law of the state September 1791, the governor's approbation of the settlement was only necessary, when the Comptroller and Register General differed in opinion: and a provision of a similar nature was made by a permanent law of the 4th April 1792. The necessity of the gov-

ernor's decision on the settlement, is wholly superseded, unless the Comptroller General shall disapprove of the settlement by the Register General.

The question is then reduced to a simple point; whether taking all the laws on the subject, the court can say, that the provisions of the lien introduced by the law of 1785, is repealed by any subsequent law?

It is agreed, that it is not repealed by express words. Nor does the court see any such necessary implication. It is not inconsistent with the subsequent laws, so that it may be fairly construed to be repealed, without negative words. On the contrary, the last clause of the act of 4th April 1782, declares that "so much of every act of general assembly, as is hereby altered or supplied, and no more, is thereby repealed."

In this view of the subject, the court are bound to decide, that the settlement in the present instance, created a lien on all the real estate of the defendant John Nicholson within the state; and that their unanimous opinion on the abstract questions submitted to them, is in favor of the commonwealth.

Lessee of ROBERT DUNNING, WILLIAM DUNNING, JOHN DUNNING, EZEKIEL DUNNING and MARK DUNNING *against* JAMES CARUTHERS.

Blunston's licenses partake more of warrants than locations, and have all the essential parts of a warrant: But an unreasonable delay in not pursuing claims under either, will be equally fatal to the right.

Some difference in equity between one laying a right on an improvement begun by another, knowing that fact, and the case of a stranger to such improvement. Verdicts in ejectment are not conclusive, but have more or less weight from circumstances; and none are stronger than where valuable improvements have been made in confidence of the verdict and judgment thereon.

EJECTMENT for lands in West Pennsbro' township, Cumberland county.

The action was tried before Smith, J. at Carlisle on the 5th May 1803. Yeates, J. declined taking any part in the cause, having been counsel for the defendant in a former ejectment for these lands, which was tried on the 23d May 1782 at Nisi Prius.

A verdict being found for the plaintiff, Smith, J. reported the substance of the evidence given on the trial; a motion for a new trial having been made.

The plaintiff claimed under two warrants: one in the name of William Armstrong, dated 16th April, 1743, for 150 acres in West Pennsbro' township, on the dry spring, adjoining lands of Ezekiel and James Dunning. On this warrant 7l. 10s. was paid, and on the Receiver General's books, this entry was made 24th "November 1744. Transferred to Robert Dunning per order of secretary, and said to belong to Robert Dunning."—But there appeared no assignment or indorsement on the warrant.

The other warrant was in the name of Robert Dunning aforesaid, the grandfather of the lessors of the plaintiff. It was dated 19th November 1743, and called for 200 acres in West Pennbro' township including his improvement between the lands of [So in the original.] Interest to commence from 1st March 187. On the date of the warrant 5% was paid to the Receiver General. It appeared by the field notes of Thomas Cookson, esq. late deputy surveyor, that a survey was made on Dunning's warrant on the 22d March 1743-4. To which was subjoined "this memorandum made by Charles Morse, a clerk of Mr. Cookson's, this claimed by John Calhoon's heirs, under a grant from the proprietaries under the hand of Mr. Blunston."

On the 9th April 1750, the said Robert Dunning devised to his son John, the father of the lessors of the plaintiff, the tract of land adjoining Ezekiel Dunning and John Davison, and directed 100 acres of it to be cleared and deeded in the office. And on the 19th June 1764, a survey of 219 acres 145 perches was made by William Lyon for John Dunning, under the two warrants.

It was marked on the draft, that "173 acres 132 perches showed by the pricked line in the draft, was formerly surveyed for Robert Dunning under his warrant, which Thomas Calhoon claims a right to, under an old grant to his father John Calhoon. The residue being 46 acres 13 perches lying on the N. W. of the old tract, is added at the request of John Dunning."

Parol testimony was adduced to prove, that in 1757 or 1758 the said John Dunning erected a small cabin on the land and put a black man and his wife in it. The ruins of another cabin near the head of a spring called Calhoons, were then visible. Some years after, Dunning sold the lands to James Foley for 400% and was to make him a patent; but if he could not do so, he was to pay him for his improvement. Foley built a house and barn and cleared according to one witness 10 or 12 acres, according to another witness 12 or 15 acres, and according to a third witness between 20 and 30 acres. Dunning forced Foley out of possession, and the improvements of the latter were valued: he made some additional clearing, and died at the flying camp in 1776.

The defendant claimed under a license from Samuel Blunston, esq. to John Calhoon, dated 17th February 1734-5, "to settle and improve 200 acres of land on Robert Dunning's spring, next below James Dunning, to be bounded on the upper side with said James, on the lower side with Ezekiel Dunning, on the east and west with the barrens, and hereafter to be surveyed to the said John Calhoon, on the common terms other lands in those parts are sold."

It appeared, that shortly afterwards, the said John Calhoon procured one James Johnston to assist him in making an improvement on Dunning's spring; they grubbed 8 acres and chopped and burnt it, fit for ploughing. During this period, they lodged at the house of Robert Dunning in the neighborhood, (he being the brother-in-law of Calhoon) who was well satisfied with their making the improvements, and laid no claim to the land. Calhoon agreed before he went off, with a neighbor to plough the land cleared, and mawl rails to inclose it, and gave him a mare in part payment. He then returned to his farm in Chester County; and by his will dated 19th September 1752, devised all his real estate to his wife Rebecca to be disposed of among his children, declaring that he had never sold his land in West Pennsbro' to Robert Dunning; and died in the same year.

A declaration in ejectment to April term 1755 by the heirs of John Calhoon against John Dunning, was found amongst the records of the Court of Common Pleas, at Carlisle. A blank affidavit of the service on the tenant was indorsed thereon, but not filled up; nor was there any docket entry of it. But the testimony given by James Smith, esq. on a former trial in May 1782 stated, that he drew the declaration and that in the term of April 1755, John Dunning called on him at Carlisle, and told him he had been served with the ejectment; that he would employ an attorney to appear for him, as he knew Calhoon had a grant from Mr. Blunston, and every one told him he had the eldest and best right, that he would quit the possession and give Mrs. Calhoon no more trouble; and he actually did quit the possession of the premises accordingly.

On the 20th July 1763, Rebecca Calhoon conveyed the land to her son James Calhoon in pursuance of the powers in her husband's will, and John Dunning having again obtained possession the said James brought an ejectment against him to July term 1768; and in April term 1773, judgment was obtained against the casual ejector, the defendant's attorney refusing to confess lease entry and ouster, agreeably to the common rule. Previous hereto on the 19th June 1764, a survey of 219 acres 145 perches was made by John Armstrong deputy surveyor under Blunston's license. And a *caveat* being filed by Thomas Calhoon in behalf of the devisees of John Calhoon, against the said John Dunning, the board of property made a decision thereon upon the 24th November 1766; wherein after reciting that it appeared to the board that William Armstrong had received back the money which he had paid on his warrant in 1773; that John Calhoon had obtained Mr. Blunston's license in 1734-5, and in the same year made his settlement on the land;

that Armstrong the first warrantee had been told by Robert Dunning, that the land belonged to John Calhoon, and he had purchased from him; that Dunning's survey was caveated in Cookson's field notes; that the widow of John Dunning had opposed a survey attempted to be made under the license; that Robert Dunning died in 1750, and John Colhoon in 1752; that after Colhoon's death, John Dunning took possession, and built a cabin on the lands; that the devisees of John Calhoon, brought an ejectment against him, and obtained the possession; and that John Dunning, after buying in Armstrong's warrant, had obtained a new survey in 1764; the Board directed, and ordered that the survey be returned on the licence granted by Blunston, and a patent be issued thereon; and that the survey made on Armstrong's or Dunning's warrant ought not to be accepted.

On the 10th December 1773, James Calhoon entered into articles with James Caruthers, the defendant in the present suit; by which the latter was to receive possession of the lands, and to pay therefor 900*l.* by instalments. The former covenanted to defend the title against the claim of John Dunning, and to repay the money and deliver up the outstanding bonds, in case of his recovery; all the consideration was paid.

John Dunning brought a new ejectment against James Calhoon to April term 1774, when being removed into the Supreme Court, came on to trial, after Dunning's death, at *Nisi Prius* at Carlisle, on the 23d May 1782, when a verdict was given for the defendant, and judgment was rendered thereon.

On the 5th September 1788, and a re-survey was made by Samuel Lyon, of 250 acres, and 53 perches, and on the 23rd April 1789, a patent issued to James Calhoon.

It further appeared by parol testimony, that in the intermediate period, between the trial in 1782 and the commencement of this ejectment in 1796, the defendant had made many valuable improvements on the lands in question. He built a stone house and barn near the head of the spring called Calhoon's, a large double house and saw mill, and cleared a considerable quantity of land.

The defendant's counsel having moved for a new trial, Smith J. recommended, that the argument should be had before the whole court in Philadelphia, without prejudice to either side which, was mutually agreed to.

And this term, the cause having been argued at great length, and with much ability, on its merits, by Messrs. W. Tilghman and Watts, for the plaintiff, and Messrs. E. Tilghman and Duncan, for the defendant,—

Shippen, C. J. delivered his opinion as follows :

The defendant's title is first, in point of time. On the 17th February 1734-5, John Calhoon obtained a license from Samuel Blunston, to settle and improve 200 acres of land on Robert Dunning's spring, bounded as is mentioned therein ; to be surveyed to the said John Calhoon, on the common terms. Shortly after this, Calhoon enters upon the land, clears three or four acres, and employs a person to fence and plough it. He then returned to Chester county, where he remained several years, without pursuing his improvement, or getting any survey made.

In March 1743-4, Robert Dunning obtained a warrant for the same land, and got a survey made in a short time after. The plaintiff claims title under this warrant and survey ; under the idea, that Calhoon had abandoned his claim, by not following it up in a reasonable time.

As to the nature of Blunston's licenses, they were issued under a special commission from the proprietaries to Samuel Blunston, a gentleman resident on the banks of the Susquehannah, to encourage the settlement of the country. Most of the early titles over the Susquehannah, originated in these licenses.

The legal effect of these licenses, has been differently construed, by the different counsel. By some, they are likened to locations, by others, to warrants. I take it, they are not strictly analogous to either, but certainly partake more of warrants than locations. They have indeed all the essential parts of a warrant, except in the single circumstance of the purchase money not being previously paid ; they contain a direction to make a survey, equally with a warrant ; and the truth is that it was the constant usage of surveyors, to make surveys under them, in the same manner as under warrants, and such surveys were uniformly accepted in the office.

But if in the present case, Calhoon had got a warrant instead of a license, if the fact be, that he abandoned his claim by an unreasonable delay in not pursuing it, it will be equally fatal to his right, whether founded on a warrant or a license.

Was there then such abandonment, as entitled another person, to obtain a title to it by warrant and survey ? The length of time that elapsed, before Calhoon took any step to confirm his right, would certainly in an ordinary case, deprive him of his right. But a considerable question arises, whether under the circumstances of this case, and considering who the party was who opposed his right, and in what manner he obtained an adverse right, these shall take the defendant out of the common case ?

Robert Dunning appears to have been privy to Calhoon's original
Yeates, Vol. IV.

right. Calhoon lodged at his house, which was in the neighborhood, when he made his clearing. And there is some difference in equity, between a man's laying a right upon land, even in the case of an improvement where he knows an improvement to have been begun by another, and where a perfect stranger lays such a right. Still if there was no other circumstance in the case, and there had been an evident dereliction, this perhaps alone would not have served the original taker up.

But in this case there is a much stronger circumstance. Robert Dunning, when he applied for a warrant in 1743, not only knew of Calhoon's prior right, but in some measure recognized it, and was guilty, as appears to me, of a deception upon the office. It seems there was a prior warrant for this same land, taken out by one William Armstrong, whom he prevails upon to surrender his warrant to him, upon an allegation that he could acquire no right under it, on account of Calhoon's having an earlier right under a license from Blunston. This warrant being then out of his way, he has recourse to an absolute falsehood, by asserting, that he had purchased from Calhoon, his earlier right. If these facts are true, his title was founded in fraud, and can have no support either in law or equity.

It is however asserted, that this deception and this fraud do not appear in the evidence, except from the decision of the board of Property and that facts recited in the minutes of that decision not appearing to have been authenticated upon oath, ought to have but little weight. This board had certainly no strictly judicial authority, but it was a tribunal known to the laws. And what has great weight with me, the presiding member of it was a gentleman of acknowledged abilities as a lawyer, and well known to myself from a long acquaintance, and thorough knowledge of him, to be a person not only of great humanity, but of the strictest veracity and sterling integrity. This possibly may tend to work a stronger conviction in my mind, of the truth of what he certifies, than it may in the minds of men, who know him not so well; but to me, it is irresistible. Under this persuasion, I cannot doubt, but there has been some foul play in this transaction, and cannot ease my conscience, without giving my voice in favor of a re-hearing of the cause.

Much has been said on both sides, on the effect of a former verdict. It is certainly not conclusive in the case of ejectments, as in other actions; but it deserves more or less weight from circumstances. No stronger circumstance can appear to give it weight, than what has happened in the present case. The contract for the purchase of this land was indeed made before the contest had received a decision; but after the cause had been solemnly tried in the highest court of ju-

dicature in this state, and a verdict given in favor of the title of the present defendant, he had every reason to suppose the dispute was at rest. In confidence of that verdict and judgment, he makes very valuable improvements, by erecting costly buildings, and other additions to the value of the land. This, though not a reason to divest another of a clear right, yet ought reasonably to create a bias in favor of a former verdict; and ought particularly to weigh with the court, not to change the possession, if they discover a reasonable doubt that justice has not been done in the last trial. This doubt, I acknowledge, exists in my mind. I therefore give my voice in favor of a new trial.

Smith and Brackenridge, justices, concurred.

Verdict set aside, and a new trial awarded.

MARCH TERM, 1804.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

ROBERT HAZELHURST and ISAAC HAZELHURST *against* MARY KEAN,
administratrix of ROBERT KEAN.

Bills of exchange drawn in South Carolina, on a person residing in any other of the United States, and protested, the holder of the bill is entitled to 10 per cent. damages, though the bill is not returned back to South Carolina. But where such bill is only given as an additional security to a bottomree bond, no damages are recoverable.

SUIT on a bill of exchange, drawn at Charleston in South Carolina, on the 16th May 1798, by the defendant's intestate, on Henry Henderson, in Philadelphia, for \$2939 13, payable to the plaintiffs at sixty days sight. The bill was accepted by Henderson on the 1st June 1798, protested on the 3d August following for non-payment, and notice thereof given immediately to the drawer.

It was admitted by the plaintiffs, that the principal sum had been paid; but they contended, that they were entitled to 10 per cent. damages, on the protested bill, under a law of South Carolina, passed 22d March 1786, the 3d section whereof, is in these words:

“All bills of exchange drawn upon persons resident within the United States, and out of this state, and which shall be returned protested, the damages of such protested bill shall be 10 per cent. on the sum drawn for. And all bills in like manner, drawn upon persons resident in any

part of North America, or within any of the West India islands and protested, the damages shall be 12½ per cent, and all bills drawn on persons resident in any other part of the world, being protested, the damages shall be 15 per cent. on the sums mentioned in such bills respectively, and all charges incidental thereto, with lawful interest as aforesaid, until the same be paid." (So. Carol. Laws, 408.)

The defendant resisted the claim of damages. If the law of a sister state is to govern our courts of justice, the plaintiffs have not complied with its injunctions, by a return of the protested bill.

By the court. The *lex loci* must govern in cases of this nature. Cowp. 343. The parties must be supposed to have in contemplation the law of the place, where the contract is made, and it necessarily forms a part of the contract. On bonds executed in Ireland, where the legal interest is 6 per cent., the English courts uniformly allow Irish interest. The same rule holds as to bonds in India, and bills of exchange drawn in different parts of Europe.

In the present case, the plaintiffs are entitled to damages, unless the words "returned protested" in the 3d section of the act, make it indispensably necessary, that the protested bill should be sent back to the state of South Carolina. Why should such bill be returned thither, unless the drawer or indorser, against whom the suit is to be brought, lives in that state? Can it answer any useful or valuable purpose to return the bill, and then have it sent back in order to found a claim for damages? In the meanwhile, the party against whom the action is intended to be brought, may leave the country, or abscond.

The penalty was intended to make men cautious in drawing bills; and we think the reason of the law is fully complied with, by restricting the word "returned" to such instances, where the defendant resides within the jurisdiction of the state. We are fortified in this opinion, by other provisions in the act. In the cases of bills drawn on persons residing in any part of North America, out of the United States, or in the West Indies, or in any other part of the world, no return of the protested bill is made necessary; and no rational ground can be assigned for the distinction contended for by the defendant.

The jury gave a verdict for the plaintiffs for \$293 91.

A new trial was afterwards moved for, but the court adhered to the opinion which the chief justice had delivered, as to the damages.

Another ground was then shown. It was stated on the trial, that the ship *Louisa* arrived at Charlestown from Bourdeaux in distress, and that the bill was drawn by the captain on his owner for necessary repairs, seamen's wages, &c. But it appeared in evidence, that a bottomree bond had been taken by the plaintiffs from the captain, for the amount, and the ship had been libelled in the District Court, and sold thereupon, and the supposed principal of the bill had been received by the plaintiffs from the marshall. This bottomree bond bore date, the day previous to the date of the bill of exchange; and therefore the idea taken up at the trial, that the bottomree bill was not the original debt, but only a collateral security, was wholly unfounded. If the bill of exchange was drawn merely as an additional security, no damages were recoverable thereupon.

Calculations were shown on both sides: and the court, after keeping the matter under advisement for some days, awarded a new trial.

Mr. Dallas *pro quer.*

Messrs. E. Tilghman and Heatly *pro def.*

REBECCA MAYBURY, JOHN WARDER and JAMES VAUX *against* AMOS JONES.

Same *against* Same.

Same *against* Same.

Sheriff is bound to sell the defendant's personal property before he can sell his lands but he may proceed otherwise with the party's consent.

It is not necessary to notify the defendant of the time and place of taking an inquisition on the lands levied on. Nor is the sheriff bound to levy on all the defendant's lands in his bailiwick, though he cannot cut up and divide a particular tract.

Judgment entered 14th November 1803, in Philadelphia county: *testatum fi. fa.*: to Montgomery county tested on the second return day of September term 1803, returnable on the last return day of December term following, founded not a *fi. fa.* not actually issued, held good.

JUDGMENTS were entered in these actions, on the 14th November 1803, as of the September term preceding. Writs of *testatum fieri facias* were issued to Montgomery county, tested on the 17th September 1803, (the section return day) returnable on the 31st December following (the last return day of the term) but no writs of *fieri facias* had been actually issued, and were only marked on the docket. The *testatum* in the first suit was indorsed, real debt 650*l.* and interest from the judgment, and was levied on 105 acres of land in Douglass township. The like sum was indorsed on the second *testatum*, upon which other lands were levied. On the third *testatum*, the real debt was marked 98*l.* 5*s.* 5*d.* and interest from the judgment, and the sheriff returned goods levied.

Mr. Frazer for the defendant, now moved for a rule to show cause, why the three executions should not be set aside, on four grounds.

1. The sheriff levied on the personal property of the defendant to the amount of 2000*l*. as appears by the defendant's affidavit. Lands are only liable to sale, when no sufficient personal estate is to be found, under the laws of 1700 and 1705. 1 Dall. St. Laws 12. 68.

2. No notice was given to the defendant of the time of the sheriff's taking the inquisitions, condemning the lands. This is in effect condemning the party unheard.

3. All the defendant's lands in Montgomery county have not been taken in execution. If the whole had been levied on, possibly the yearly rents and profits might be sufficient to satisfy the debts beyond all reprises, within twenty years; and the proceeding against a part is a fraud on the provisions of the act of 1705.

4. The executions have issued informally, and are not warranted by any law of the state.

Mr. Wells for the plaintiff observed, that the act of the defendant prevented the sheriff from going on with the sales of the personal property and at his instance the real estate was levied on. That the practice under the act of 1705 had never required any notice to be given to the defendant of the holding an inquisition, or that the whole of his lands held under different titles should be taken in execution and that the executions issued in the present instance were warranted by the decision of the court in *Ewing v. M'Nair*. 2 Dall. 269.

By the court. The sheriff is bound to sell the defendant's personal property, before he can proceed to the sale of his lands: but he may be discharged from responsibility in this particular, by the act of the party himself.

It never has been held necessary to notify the defendant of the time and place of taking an inquisition on lands levied on. A contrary practice has uniformly prevailed, and we have never known inconveniences to arise from it.

Nor is the sheriff bound to levy on all the defendant's lands in his bailiwick: It is true, he cannot cut up and divide particular tracts, but he is bound to follow the directions of the plaintiff, as to seizing on a specific tract, and this is constantly done.

No injury will be done by supporting the present executions. It will conduce to justice, by preventing a defendant from aliening his property to the prejudice of his creditors. It is not stronger than the case of *Ewing v. M'Nair* cited, and is war-

ranted by the act of April 18th, 1795. 3 St. Laws 770. Rule to show cause denied.

The parties afterwards came to a compromise, and the plaintiff's counsel agreed not to proceed to the sale of the lands, until the 16th May next.

Appeal of GEORGE M'CULLOUGH and ISABEL his wife executors of THOMAS GRUBB, from the decree of the Orphan's Court of Lancaster county, on the settlement of their administration account.

By a devise to testator's wife, of all the benefits of all his real estate until his children come of age, grain growing in the ground at the time of the testator's death, passes to the widow.

THE sole question arose on the will of the testator, dated 27th May 1777, in which there was the following clause. "I give unto my well beloved wife Isabel Grubb, the remaining part of all my personal estate, and the benefits of all my real estate, till the children my sons within mentioned come of age to enjoy their possessions."

Grain was growing in the ground at the time of the testator's death. The executors charged themselves therewith in the inventory, and prayed credit for the amount 87*l.* 10*s.* in their account: but the court refused to allow the credit.

By the court. By devise of land in fee or for life, corn growing in the ground at the time of the testator's death, will pass to the devisee, though in the case of an intestacy, such corn will be accounted assets. *Winch.* 51. *Cro. El.* 61. 1 *Rol. Ab.* 727, *Hob.* 182. *Gilb. Law of Evid.* 251. 3 *Atky.* 16. *Harger. Co. Lit.* 55. *b.* note 2. Of this there can be no question. Will a devise of the benefits of the estate during the minority of children make a difference?

For the appellants. It is apprehended not. By a devise of the profits of the land, the interest in the land is vested in the devisee. *Co. Lit.* 4. *b.* *Cro. El.* 109. 190. See also 1 *Vez.* 172. 10 *Mod.* 287. *Dy.* 210.

Per cur. Let the decree of the Orphans court be reversed.

Messrs. Smith and Hopkins for appellants.

Mr. Ingersoll for appellees.

JOSEPH COULON against JOHN MORTON and JOSIAH HEWES executors of JOSEPH ANTHONY, deceased, surviving partner of THOMAS S. ANTHONY, trading under the firm of JOSEPH ANTHONY and Son.

JOHN MORTON et al. executors, &c. *against* JOSEPH COULON. JOHN MAYBIN, surviving partner of JOSEPH ANTHONY and Company *against* JOSEPH COULON. JOSEPH COULON *against* JOHN MAYBIN, surviving partner.

The court will not lend its aid to enforce a contract between a foreigner and a citizen, whereby vessels are bought and equipped, registered and navigated in the name of the latter and for the use of the former in violation of the laws of the U. S.; and on that ground set aside the reports of referees, though a debt was really due. Court disapprove of letters written by a party to an individual referee on the subject in dispute, though done without an improper view.

THESE four actions were referred, by consent of the different parties, to John Perot, James Vanuxem and Robert Ralston or any two of them.

On the 22d February 1803, they signed their reports.

In the first action, they found for the plaintiff Coulon, the sum of \$1207 23 cents, due from the defendants as executors; and also that the plaintiff was entitled to receive from the defendants, or John Maybin the surviving partner, 4,260,107, livres and 2 sous of a depreciated paper currency, placed under the care of Henry R. Balance, at the Isle of France, being the sales of a cargo shipped by the ship Northern Liberties.

In the second action, they found for the defendant.

In the third action, they found for the plaintiff Maybin, the sum of \$30,708 16 cents due from the defendant Coulon; and that on the payment thereof the defendant would be entitled to receive from the plaintiff the ship Little Martha, subject to wharfage and attendance subsequent to 20th November 1802, and also to 112l. 8s. 6d. sterling, when the same should be recovered from Humble, Hurry and Holland, merchants, in Liverpool.

And in the last action, they found for the defendant.

These reports were excepted to on the part of Coulon, and a great mass of evidence brought before the court on both sides. The referees were fully examined, and the matters both of fact and of law, were urged at great length at the last term and during the present term, by Messrs Dallas and Du Ponceau in behalf of Coulon, and by Messrs. Ingersoll and M. Levy, for the adverse parties. The hearing consumed nearly five days.

It appeared, that Coulon was an opulent French citizen, and came into this state an alien in the fall of 1794. He was naturalized here in February 1798.

The partnership of Joseph Anthony and Son commenced in

1790. The partnership of Joseph Anthony, Josiah Hewes, Anthony and John Maybin commenced in March 1796, Joseph Anthony died in September 1798, and Josiah Hewes Anthony died in 1800, leaving John Maybin surviving partner.

On the 26th December 1794, Goulon wrote a letter to Anthony and Son, wherein he informed them that he was the sole owner of the Danish ship Victorina and her cargo, then in the river Delaware ; and requested them to execute a fictitious sale of the cargo in their books, and he would allow them a commission thereon to be paid by themselves, but requiring them to advance him \$25,000 in the course of the next month. He enjoined them the most profound secrecy. In a subsequent letter of the 6th of January 1795, he again leaves it to them to fix their commissions, for transacting the business.

On the 16th of the same month, they returned him an answer, that they will only charge him the usual commissions ; that the business with him was by no means desirable, and they did not covet it.

Joseph Anthony and Son received the cargo into their possession, on which Coulon affixed the selling prices.

In July 1796, Anthony and Company after a previous communication with Coulon, and by his order, authorized George and Hugh Pollock of New York to purchase the ship America on their account, and to go as far as \$14,000. This was to be effected with the proper funds of Coulon, but the property masqued in the name of Anthony and Company. The purchase was made accordingly, and a further sum of \$27,656 97 cents was expended in disbursements on her, exclusive of her first cost.

The America received a temporary register at New York as the property of Anthony and Company on the 30th of August 1796, and sailed from that port to the East Indies ; and in the month following, policies were effected on the ship and cargo, both at New York and Philadelphia, to a considerable amount, wherein they were warranted to be the property of Anthony and Company. She returned from Madrass into the port of Philadelphia in March 1798, underwent a complete repair, and was afterwards sold to Nicklin and Griffith for \$60,000, and his register transferred to them by John Maybin, the surviving partner, on the 14th of March 1799 ; and the bond at New York was canceled, on the first register being delivered up. On the 16th February preceding, Coulon agreed to this sale, and expressed himself better pleased therewith, as it would enable the Company to receive the large debt due to them.

On the 3d July 1798, Joseph Anthony and Company complained that they were in advance for the America alone above \$20,000, the goods of Coulon in their hands being locked up at too high prices, and wishe

him to take his affairs into his own hands. In the course of that year, several letters from Coulon stated that the repairs of the *America* greatly exceeded the estimate and his instructions.

Another vessel called the *Little Martha*, sailed under the names of Anthony and Company, though really belonging to Coulon. Shipments were also made in their names for the use of Coulon; and in one instance they obtained payment from the underwriters for a loss on the vessel *Hannah*.

Anthony and Company kept all the accounts of their joint concerns, Coulon placing the most unbounded confidence in them. He resided in Philadelphia, and was privy to all the transactions. On the 1st April 1802, the first general account current was furnished by Maybin.

In the course of the proceedings before the referees, Coulon made no objections whatever to the nature of the illicit transactions he had been engaged in with Anthony and Son, or Anthony and Company; and he carefully avoided implicating Maybin, as being knowingly concerned in the breaches of the law of the United States. His objections to the accounts were grounded on a supposed violation of his orders, the injudicious expenditures of money, and improper conduct in the agency. Mr. Ralston, one of the referees; declined acting in the business, on being informed of the gross violation of the laws of the Union; this produced a letter from Maybin, denying his privy of the unlawful transactions, and conjuring him in strong terms to proceed in the settlement: Coulon likewise importuned the referees to go on, and in consequence thereof they proceeded with the accounts.

Seventeen different exceptions were filed by Coulon to the reports; whereof the greater part went to supposed specified errors of the referees, in allowing improper charges against him, and refusing him, just credits. Three of the exceptions asserted, that on the face of the reports, two of them appeared to be ambiguous, unequal, and impossible to be carried into execution. One thereof charged his adversaries, with having made communications to the referees, in his absence; and two of them attributed errors in law to the referees, in sanctioning by their decision, transactions growing out of a contract, unlawful in itself and void.

The objections founded on the supposed errors in fact, were heard very fully, together with the observations of the referees and counsel thereon. The only difficulty which arose in the minds of the court was on the question of law, whether under the circumstances of the case, they could judicially approve of these awards; and to this point the present report of the cases is confined.

The arguments of the counsel, on the part of Joseph Coulon, were substantially as follows :

Mr. Coulon, has done no more, than would naturally occur to the subject of a belligerent power, who wished to buy of a neutral, the chance of recovering his property. Mr. Maybin, the surviving partner of Anthony and Company, demands money from him, and asks the exercise of the powers of this court, to enforce the payment. He is the actor, and it lies with the court to say, whether legally his request can be granted.

Much stress will be laid on the decision of the referees ; but the determinations of such tribunals should be narrowly watched. Though the referees are judges of the parties' own choosing, they are bound by the law, equally as other citizens. The court must examine, before they can approve of a report, which is questioned. Neither can the court, nor referees, give effect to a contract, unlawful and immoral in itself.

The ship *America* was bought in New York, in pursuance of the original corrupt contract. She was an American bottom registered in the names of Anthony and Company, but in trust for Coulon, and was purchased with his funds.

By the registering act of the United States, passed 31st December 1792, (2 U. S. Laws, 131,) no vessels shall be entitled to the benefits or privileges of the vessels of the United States, longer than they shall continue to be wholly owned by the citizens of the United States. § 1. When purchased by an agent at a distance from the owner, such agent must swear that she is solely owned by American citizens ; and when the vessel shall arrive in the port of the owner, the temporary register is to be given up, on the owner's making oath of his property. § 12. If a vessel, registered as a vessel of the United States, shall be sold, in whole or in part, by way of trust or confidence to a foreigner, and such sale shall not be made known, she shall be forfeited, with her tackle, apparel and furniture. § 16. Upon the entry of vessels of the United States, from foreign ports, the owner is to swear, that the register contains the names of the owners, and that no foreign subject or citizen hath any share by the way of trust or confidence in such vessel. § 17. And if any register shall be fraudulently used for any vessel, not actually entitled to the benefit thereof, such vessel shall be forfeited. § 27.

The act of congress, to regulate the collection of duties on imports and tonnage, passed 2d March 1799, (4 U. S. Laws, 842,) prescribes the form of the oath to be taken on the entry of goods, in order to enforce the just payment of the duties, imposed by the laws of the Union.

What perjuries and frauds must this agreement between the parties have given birth to! But Coulon was a stranger to our laws. When the temporary register of the *America*, was obtained in New York, perjury must have been committed. When it was delivered up, a new perjury must have followed. When she arrived in this port from Madrass, the entry both of vessel and cargo, must have been accompanied with perjury. She then ought to have paid alien, duties, because an American vessel once sold to an alien, can never revive her American character. The United States are thus deprived of their just duties, and though Maybin has executed the bill of sale, the difference between the alien and domestic duties remains unpaid. Underwriters have been defrauded in the case of the *Hannah*, covered under the names of Anthony and Company, when they paid the loss, supposed to have accrued to American property. An insurance contemplating a deceit on belligerent nations, is clearly a fraud, and necessarily renders American property in greater danger of capture. The undertaking therefore on the parts of the company in consideration of commissions, and interest on money advanced by them, to lend their assistance to Coulon, was an iniquitous act, in direct violation of the laws of nations, of the United States, and of the plain principles of fair dealing. The services were rendered, and the moneys paid to effectuate an illegal and immoral purpose. It was more than *malum prohibitum*. Joseph Anthony and Company were parties with Coulon, in the unlawful contract, not partners. They bought vessels and goods with his money, and were the ostensible owners. He was kept out of sight, and was wholly unknown to the carpenters, artificers and material men. Hence they may well recover their just demands from Anthony and Company, because they were ignorant of the fraud. But if their labors or materials had been supplied, with a full knowledge of all the circumstances, the law would not lend them its assistance; for their cause of action would then have arose *ex turpi causa*. Here the original agreement inevitably led to the crimes of perjury and fraud.

All contracts, the objects of which militate against the principles of morality, or which are entered into with a view to evade the law, being in their nature immoral, are essentially vitious, and cannot be supported. 1 Pow. 'Contra. 183. An agreement is unlawful, if it be to encourage unlawful acts or omissions, or to induce the omission of something, the doing of which is a duty in the person with whom it is made. *Ib.* 195. General reasons of policy and public expediency will invalidate contracts. *Ib.* 201. In *Holman v. Johnson et al.* Cowp. 348. Lord Mansfield says, no court will lend his aid to a man, who founds his cause of action upon an immoral or an illegal act.

If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgressions of a positive law of this country, then the court says, he has no right to be assisted. If a house is let to a woman for purposes of prostitution, and the plaintiff is fully conscious of that fact, he cannot recover the rent. 1 Bos. and Pull. 341. *Espin Cas. N. P. 13*. In *Biggs. v. Lawrence*, 3 Term Rep. 456, Lord Kenyon says a person suing in a court of law, must disclose a fair transaction, and it must not appear from his own showing at least, that he has infringed the laws of his own country: and the other judges expressed the same opinion. If a Guernseyman collude with a person in England, to evade the revenue laws by a sale of goods for the purpose of smuggling them into England, he shall not be assisted by the laws; and Lord Kenyon said, such conduct savoured strongly of immorality. 4 T. R. 467. So a foreigner having packed up goods abroad by order of the buyer in a particular manner for smuggling them into England, and knowing at the time they were to be smuggled, cannot recover the value of them against the buyer. 5 T. R. 599. The same principles are adopted by Lord C. J. Eyre, in *Lightfoot et al. v. Tenant*, 1 Bos. and Pull. 554; and he observes, that no man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. *Ib.* 556. If an action be founded on a policy of insurance on a ship or goods, employed or carried in the course of a contraband trade, no action lies on such policy: it would be a reproach to law and justice to countenance such an action. *Ib.* 279. S. C. in B. R. 6 T. R. 723. *Camden et al v. Anderson*.

In *Faikney v. Reynous et al.* 4 Burr. 2069, it was adjudged, that a bond given to reimburse the compounders of difference of stocks, half of what he had paid for himself, and a person jointly concerned in the contracts compounded, was not void, and in that case Lord Mansfield is made to say, that the offence relied upon as furnishing a ground of defence against being liable to pay it, was not *malum in se*; it was only prohibited by the act of parliament. The other judges concurred, that it was a good bond on the fact of it, till the obligor could show, that it was bad. But in *Petrie v. Hannay*, 3 T. R. 421, Lord Kenyon examines that case, and ascertains that the whole argument at the bar, and the decision of the court, proceeded on the ground that they could not take into consideration, matter which was not properly introduced by the plea: they thought, that as nothing illegal, as between those parties, was disclosed on the record, the payment of the money could not be resisted. Erksine and Wood in this argument, put this case: Suppose A. and B. in partnership, contract or smuggling goods, and A. pays the whole, and B. gives him his

note for his proportion, it never was pretended that A. could recover on such note from B. It is true, three other judges differed in opinion from Lord Kenyon; but it will be remembered, that it was a case between partners, not *malum in se*, and where the plaintiff was not interested in the use of the money. In the case now before the court, the reverse holds in all those material particulars: and no case can be shown in the books, where the agreement of a party, having in view the breach of positive law, and involving necessarily in its effects the gross offences of perjury and fraud, has received the assistance of a court of justice. In 3 Ves. jr. 373, it is said by the Lord Chancellor, that it has been repeatedly adjudged, if a man has been employed to buy smuggled goods, and paid for the goods, and the goods come to the hands of the person who employed him, that person shall not pay for the goods. And so far has this principle been carried, that where a bill of exchange grew out of a stock jobbing transaction, drawn by the broker, who had paid the differences of those transactions with other persons, and indorsed to an innocent person who knew of the illegality of the first contract, it was adjudged, that the indorser could not be permitted to recover on the bill in a court of law. 6 T. R. 61, Sturs v. Lashly. In Booth v. Hodgson, *Ib.* 405. A. B. and C. became partners in insuring ships, contrary to stat. 6 Geo. 1, c. 18, s. 12, but it was agreed that the policies should be underwritten in the name of A. only; several policies were effected, and the premiums received by C. and D. as brokers: and it was held that A. could not recover those premiums, from C. and D. There the court said, they would not suffer a case to be garbled, parts of the transaction to be suppressed, and a mutilated state of it to be imposed on the court, as the true and genuine transaction. On the whole case disclosed, the law would not raise a promise out of the illegal contract. In Farmer v. Russel et al. 1 Bos. and Pull. 297, Lord Chief Justice Eyre lays down the rule, that a demand necessarily connected with an illegal contract and tending to facilitate the execution of it, will be vitiated by that contract: and Rock, J. says, that if a plaintiff discloses a case of foul fraud on his own part, for which he merits an indictment, he ought not to be heard, however great the demerits of the defendant may be. *Ib.* 300. Eyre C. J. declared himself well satisfied with the opinion in Camden and others v. Anderson, in the exchequer chamber, that violating a prohibition, of a species of commerce in which the interest of the country was concerned, was not merely *malum* prohibition, but *malum in se*.

Mr. Maybin became one of the partners of the firm in March

1796, and the American was not purchased until the month of July following. The demand set up by him is derived from a corrupted source, even supposing him to be unacquainted with the nature of the original transaction in all parts, which can scarcely be admitted. Mr Coulon has never waived the illegality of the contract : its immorality could not be waived. No hopes of success can be entertained by the adverse counsel, unless they are permitted to garble the case, and prevent the court from taking the whole into view.

But this cannot be done : they cannot marshal their advances of money to workmen or for materials, in one column by themselves. They cannot balance the moneys received for Coulon, with their enormous commissions of nearly \$40,000, transpose the payments at their will and pleasure. The doctrine of creditors applying payments in a running commercial account, has never yet been adopted.

The arguments of the counsel, on the part of the executors and of the surviving partner were as follow :

In the language of Judge Grose, 3 T. R. 425, the defence set up is against all the honor and honesty. Coulon comes before the court with an ill grace indeed. He arrived in this country after the British had gained a decided superiority at sea over the French nation, and wished to partake of the benefits of a neutral trade. A mutual confidence took place between himself, Joseph Anthony and Son : he seduced them from the path of their duty as citizens of the United States, and after their deaths, reproaches their memories with crimes of which he was the sole cause. Before the referees he affirmed the execution of the original contract ; and now finding himself foiled and disappointed in his expectations, as to the relative merits of the controversy between them, has recourse to a law payment, to discharge a balance due from him, on every principle, which should influence his conduct.

The legal question before the court may be considered under two general heads.

1. Is it competent to Coulon, under existing circumstances, after the reports filed, to urge the illegality and consequent invalidity of the contract ?

2. Is the suit immediately in question founded on such a contract as cannot be enforced ?

1. The case of *Watts v. Brooks*, 3 Ves. jr. 612, is strongly in our favor. There was a contract to be jointly concerned in ship insurances, which is made void by stat. 6 Geo. 1. c. 18. s. 12. The policies were subscribed by them in their separate names ; and on a bill brought for a general account of all their dealings and transactions,

the lord chancellor said, he did not execute a contract against law, by directing a general account. He thus expressed himself: "When the parties have had dealings together upon a variety of transactions, and losses have been incurred and paid, and a general account is sought, I should do injustice if I did not give the advantage, if any advantage has arisen, or charge any loss which has happened. If it had been a smuggling business, and they had been settling profit and loss upon a course of smuggling transactions, I should do great injustice if I did not bring that into the account. So upon stock transactions, though the court would not execute the contract yet, when the parties have been settling stock dealings, and paying differences, I must bring those into the account."

He said there was nothing immoral in the transaction, but it was against a prohibitory statute. But the present case before the court possesses much stronger features.

Here the agreement between the parties, has been executed by judges of the parties own choosing, under a rule of this court. And whoever makes an exception to a report, must substantiate it, or he fails. Here it is incumbent on Coulon to satisfy the court, that the identical money reported to be due from him, arises from an unlawful or immoral ground.

Contracts executed, may be enforced though the court would not aid them in the first instance. 1 Pow. Contra. 200. In *Faikney v. Reynous et al.* cited from 4 Burr. 2069 (S. C. 1 W. Bla. 633) a bond given for differences on stock jobbing transactions, was held good: And though Lord Kenyon has undertaken to say, that the decisions of that case went on the form of the plea; yet Ashurst and the other judges were of a different opinion, and asserted that the court permitted a discussion of the facts stated in the plea, and they argued from them, 3 T. R. 422. Buller, J. observes, that lord Mansfield was silent on the question of pleading, and that he gave his opinion on the general ground, that if one person apply to another to pay his debt (whether contracted on the score of usury, or for any other purpose, it makes no difference) he is entitled to recover it back again. *Ib.* 424. There money was lent to another to fulfill a prohibited contract; but we are now arguing the validity of a report wherein it has been the uniform practice to demand the exposure of some mistake of a clear principle of law leading to injustice, before the court will set it aside.

As to *Steers v. Lashley*, 6 T. R. 61, which has been cited, the dispute concerning the differences was not referred by rule of court, because the remedy would then have been by attachment, under the stat. of Will. 3: and in fact the plaintiff was one

of the arbitrators. The whole was a stock jobbing business, and if the differences had been paid, the court would not have interfered: because Lord Kenyon expressly agreed, that if the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then he might have recovered.

The Little Martha was bought in Halifax in 1798, after the naturalization of Coulon in February preceding, and Anthony and Company became the paymasters. The America arrived here from Madrass in March 1798. Anthony and Company expended on her, in repairs after her arrival no less a sum than \$40,980 60 cents (which exceeds the sum found due) over and above a considerable advance for seamen's wages, which are supposed to be unexceptionable. Is it possible, that Coulon can obtain credit for the \$60,000 for which she was sold, and leave the repairs unpaid, which have so greatly argumented her price? He cannot affirm and disaffirm in the same breath: when he has once made his election, he must abide by it. If the company cannot garble the transaction, neither can Coulon cull the items of the accounts at his pleasure. If exceptionable articles are struck out on one side, so also must they be on the other. But the rule holds only as to executory contracts: this has been executed by the report of the referees, who have settled the accounts.

Between 1794 and 1803, a great variety of transactions have taken place between the parties to the amount of nearly \$500,000; many of the articles are confessedly legal in their strictest view. What principle would prevent Anthony and Company, or the surviving partner even at this day, from appropriating the payments?

In *Ashbrook v. Hall*, in C. B. cited Cowp. 348, where money was paid for the defendant for a gaming debt, it was held recoverable. And in *Petrie v. Hannay*, already cited, lord Kenyon states that smuggling is not *malum in se*, as contradistinguished from *malum prohibitum*. 3 T. R. 422.

II It will be found on examination of all the cases, cited by the adverse counsel, except *Steers v. Lashley* (6 T. R. 61,) that they go to the cases of principals in illegal transactions, and not third persons. Anthony and Company do not fall within the spirit of those decisions. And it cannot be denied, that in the excepted case Lord Kenyon in the absence of Grose and Lawrence Justices, made very free with former decisions.

In many of the authorities, which have been adduced, the contracts were avoided by positive law.

We lay much stress on the payments and disbursements made by Anthony and company, as the agents of Coulon, to tradesmen and Yeates, VOL. IV.

material men for repairs to the *America* after her arrival from the East Indies, when nothing illegal was meditated. We presume, no case can be shown, where an agent has paid honest and fair debts for his constituent, which might have been enforced against him, and could not recover the same from his principal.

An enhanced price has been obtained for this vessel, in consequence of these repairs, which has gone to the emolument of Coulon: and why should he not repay them? One who receives money to another's use, on an illegal contract, cannot be allowed to retain it. One who pays over money to another's use, cannot dispute the legality of the original consideration: having once waived the legality, the money shall never come back into his hands again. *Tenant v. Elliott*, 1 Bos. and Pull. 4. No case is to be found where money has been actually paid by one of two parties to the other, upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again. Per Lord Kenyon, 8 T. R. 577.

But our great reliance is on the case of *Watts v. Brooks*, 3 Ves. jr. 612, where there was a bill and decree for a general account. It bears a strong analogy to that under consideration.

The court kept the matter some days under advisement; and afterwards Shippen, C. J. delivered the opinion of the court.

There appears in this case to be a just debt, as between the parties, due from Coulon to Maybin, the surviving partner of Anthony and Company. The payment thereof is resisted by the very man, at whose instance and for whose benefit those laws have been violated, which form the great objection to the recovery of it. If it were therefore possible for us, consistent with the laws of the land, to enforce the recovery, we feel the strongest disposition to do it. We have, however, fully considered the case in all its parts, together with the authorities cited on both sides, and are compelled to say, the laws of the United States, the great principles of public policy, and the regard we must pay to the evident prosperity and safety of our country, which would be endangered by permitting its navigation laws to be violated or evaded, absolutely forbid our affording the aid of this court, to the recovery of a debt founded upon such a violation or evasion. The debt originated in a contract between a foreigner and a citizen, to mask the property of the foreigner, by purchasing and equipping vessels with his money and for his use, and by registering and navigating them in the names of American citizens; which could not be done without the grosest perjury.

We listened with some satisfaction to the distinctions made by the counsel of the surviving partner, tending to show a separation

of the balance founded by the referees from the illegal transactions ; but we find the whole so connected, that it is impossible to separate them. The balance is, in part at least, formed by allowances made or commissions on these transactions, and interest on advances made on that account ; and in order to settle this balance, it was necessary for the referees to connect and consider the whole business together. No part seems to be untainted by the original violation of the laws, which we are sworn to support.

The other exceptions to the report, might, we think, have been got over, but this cannot.

The letter written by Mr. Maybin to one of the referees, is certainly exceptionable, as containing persuasions to befriend him ; although as the main intent of it seems calculated rather to procure his consent to act as a referee, than to influence his judgment in the decision, we think it insufficient to invalidate the reports : and we only take this notice of it, least we should seem to countenance this kind of applications to individual referees, which we certainly disapprove.

There is no task more repugnant to the feelings of conscientious judges, than to be obliged to decide against the justice of the case, but imperious law and the public good require it here. We are therefore compelled to say, the reports must be set aside.

Appeal of JOHN ANDERSON, acting administrator of CHRISTOPHER GRIFFITH (the 2d,) from the decree of the Orphan's Court of Lancaster county ; on the settlement of his administration account.

Heir at law may be estopped by his acts in a court of record from asserting his right, and thereby convert real into personal estate.

THE following facts appeared from the records of the Orphan's Court, on which the question of law arose.

Christopher Griffith (the 1st) died sometime previous to 1761 intestate, seized of 200 acres of land in Salisbury township in Lancaster county ; leaving a widow, named Isabella, (afterwards married to George Leach) and six children, the eldest named John and the second son Christopher, whose estates was under consideration. On the 2d June 1761, John obtained a valuation of his father's real estate at 780l. which was confirmed to him, on paying or securing to be paid the shares of the other children within one year, by the Orphan's Court. He gave no security in the Orphan's Court, but paid off the distribution shares of all his brothers and sisters, except of Christopher (the 2d) who was *non-compos mentis*, and discharged the yearly in-

terest of one third of the valuation of the real estate to his mother. It is agreed by the friends and relations of the family on the 20th January 1676, that the said John should be credited for such sums as were expended by him on account of his brother Christopher out of the valuation, and settled with him accordingly.

After the death of John Griffith intestate, his eldest son Christopher (the 3d) obtained another valuation of the same real estate at 1697l. 15s., and on the 6th September 1786, the premises were confirmed to him, on paying or securing to be paid the distributive shares of the other children of the said John, within fifteen months. The record of the Orphan's Court then proceeds thus :—" And it being represented to the court by Christopher Griffith (the 3d,) and John Anderson and George Leach, guardians of the minor children of the said John Griffith, that a principal of 260l. remains charged on the said lands, under an order of Orphans Court of 2d June 1761, in order to enable the said John to pay off the sum of 15l. 12s. yearly during the natural life of Isabella Leach, widow of Christopher Griffith, grandfather of the said Christopher (the 3d ;) and that the principal of the distributive share payable to Christopher Griffith, (the 2d) of insane memory being 75l. 4s. 8½d., together with divers sums of interest, is also due from the estate of the said John, and that other sums likewise amounting to 914l. 7s. and upwards, are also due from the said estate, and that there remain only 13l. 12s. 6d. of the personal estate to pay the same ; the court directs, that the said Christopher (the 3d) do pay out of the valuation money, the aforesaid sums, and any other moneys which may be justly due from the estate of the said John Griffith, that he be credited with the interests of any money payable therefor, within the said fifteen months, and that the residue only of the said valuation be paid by the said Christopher (the 3d,) after the payment of the just debts of his father, and the expenses of the valuation and confirmation, to and amongst the widow and children of the said John Griffith."

Christopher Griffith (the 2d) continued in a state of mental derangement, until the time of his death on the 20th June 1793. John Anderson and another administered on his property.

On the 26th June 1793, he settled his administration account in the register's office and in the Orphan's Court. He was charged therein as follows :

| | | | |
|---|----|----|-----|
| With the distributive shares of the decedent of the | l. | s. | d. |
| valuation of his father's lands, - - - | 75 | 4 | 8½ |
| With interest thereon from 20th January 1776, | | | |
| to 26th June 1793, - - - - - | 66 | 1 | 11½ |

| | | | | | | |
|---|---|---|---|-------|-----|-------|
| With bond due from the administrator of John Griffith, deceased, | - | - | - | 67 | 7 | 1 |
| With interest thereon from 20th January 1776, to 26th June 1793, | - | - | - | 64 | 19 | 8½ |
| With the distributive share of the decedent of the personal estate of his father, | - | - | - | 13 | 9 | 1½ |
| | | | | <hr/> | | |
| | | | | £. | 287 | 2 7 |
| And credit was allowed for divers payments made by him, amounting to | - | - | - | 23 | 7 | 7 |
| | | | | <hr/> | | |
| Balance in the hands of the accountant, | | | | £. | 263 | 15 00 |

From the sentence in the Orphan's Court Anderson appealed, and the only question was, whether as between the children of Christopher Griffith (the 1st,) his grandson Christopher (the 3d,) and the accountant the distributive share of Christopher (the 2d) was to be considered as personal estate under the circumstances of the case, or, whether the one undivided seventh part of the land did not vest in Christopher (the 3d,) as heir at law of his uncle Christopher (the 2d)?

Mr. M'Kean for the appellant, relied on *Walton v. Willis*, 1 Dall. 351. The premises never became wholly vested in John Griffith, as he neither paid nor secured the payment of the valuation money of the share of his brother Christopher (the 2d,) and therefore this seventh part descended to his heir at law.

Mr. Hopkins, for the other branches of the family, contended that under existing circumstances, Christopher (the 3d) was estopped from claiming as heir at law. It is well known, that no recognizances were given in Lancaster county, for the children's shares of a valuation, until some years after the revolution. Christopher (the 2d) was *non compos*, and no legal payment could be made to him. John therefore could only bring the share into the Orphan's Court and lodge it with the clerk, where it would have remained wholly unproductive. It was much more beneficial to the family, and also to the unfortunate man, to let the share continue as a charge on the land, into whose hands soever it should come, and apply the interest from time to time, according to the necessities of the lunatic. Such was the state of the law previous to the revolution, that no legal mode could be then adopted, to appoint a committee over the estates of insane persons: But here Christopher (the 3d) has concluded himself, by his solemn act in a court of record. On the 2d September 1786, all the family considered the right of Christopher (the 2d) to his share of the land itself divested; and his nephew, step-father, and the accountant affirm, in

the Orphan's Court, that 75*l.* 4*s.* 8½*d.*, with interest, is due therefor from the estate of John Griffith, deceased : and for these sums Christopher (the 3d) obtains credit out of the amount of the valuation. The consequence must be, that he shall only take an equal share of the valuation with his brothers and sisters, so far as respects his uncle's interest therein ; and complete justice is done thereby to all the family.

By the court It seems to us, that the grandson is concluded from claiming this undivided seventh part of the lands, as heir at law of the lunatic. Estoppels are of three kinds ; by matter of record, in writing, or in *pais*, and the acceptance of rent is of the last sort. One of the reasons why estoppels are allowed is, that what a man has once alleged, is to be presumed true, and therefore he ought not to contradict it.* What passed between the parties in the Orphan's Court, operates most strongly against Christopher (the 3d,) and he ought to be concluded thereby. Let the decree of the Orphan's Court be affirmed with interest.

* Harg. Co. Lit. 352. a. Vide 1 Ridg. jr. Parl. Cas. 25. 102. When a record is an estoppel to the party, it must be direct and in point to the fact, which the party is estopped from proving contrary to the record, concerning that fact.

Lessee of WILLIAM WILSON *against* MICHAEL RHOADES.

A plaintiff under special circumstances, may recover in ejectment, though the survey returned excludes the lands in question, if the survey of the lands be found by the jury.

EJECTMENT for lands in Mifflin county. This cause was tried at Lewistown in the Circuit Court, on the 26th May 1802, before Yeates and Brackenridge, Justices, when the jury found a verdict for the plaintiff.

A motion for a new trial was made, but not argued ; and it was afterwards agreed by the counsel, that an entry should be made on the record of the motion being overruled, and judgment entered for the plaintiff, in order to bring an appeal thereon to this court, without prejudice to either party.

Yeates, J. reported the evidence given at the trial substantially as follows :

Both plaintiff and defendant claimed under equitable, as well as legal titles. The defendant holds as a tenant under John M'Veagh.

It appeared, that Charles Steward, in 1755, cut some few rails on the 72 acres in dispute, and made consentable lines with two of the neighbors, but never resided on the land, nor put in any grain.

In 1761, one Daniel Notherey built a cabin on the lands, hung

a door on it, but had no chimney. He cleared between two and four acres of land, ploughed it and planted the same with corn. He resided in his cabin. Stewart attempted to open a log for rails in 1763, but was driven off by the people, who assisted Netherey in making rails. Netherey continued to live on the land till about the harvest time of 1763, and then fled with the other inhabitants, from the Indian ravages.

On the 20th May 1765, Thomas Burney entered up a judgment against Netherey for 5*l.* in Cumberland county, and a *fi. fa.* being issued, returnable to January term 1766, the improvement was levied on, and condemned by an inquest.

On the 7th August 1765, Burney takes out a warrant for 300 acres including his improvement, adjoining Andrew Brandon, Adam Carson, James Gally, and Daniel Netherey. Interest to commence from 1st March 1758.

On the 10th April 1765, a survey was made hereon, by William Mac-lay, containing 192 $\frac{4}{16}$ acres, the draft whereof excluded the 72 acres in question ; but it did not appear when the same was returned into the office of the Surveyor General.

William Maclay, esq. swore, that when he made the survey in 1766 for Burney, and came to the improvement said to be Netherey's, which was then vacant, he was requested by Burney to run such lines, as that it might be included in the survey, saying, he expected to buy it. He accordingly run such courses, as would enable him to make a return of the improvement provisionally on Burney's warrant ; but Burney was to satisfy him about his having made the purchase, before the survey was returned, which he neglected to do.

A *venditioni exponas* issued in the suit of Burney against Netherey, returnable to July term 1766, upon which the lands and improvements were sold to Burney for 7*l.* 10*s.*—and on the 22d January 1767, the sheriff, John Holmes, esq. executed to him a deed for the same, which was duly acknowledged in open court.

Sometime after, but the precise year did not appear, Burney put Anthony Saltsman a tenant on the land, who lived there two years. Joseph Howard, who claimed the land, pressed him to give the possession up to him. On his refusal, Howard ordered his negro to throw the roof off the cabin ; and afterwards, in the absence of the wife of Saltsman, he obtained the possession, which has continued in him and M'Veagh, and their tenants, ever since ; and about thirty acres are now cleared land.

On the 7th August 1770, Burney entered a caveat against Howard's survey, alleging a prior warrant and survey. The division thereon did

not take place till 12th January 1791, many years after Burney's death, when the Board of Property awarded the 72 acres to Howard.

In October term 1782, judgment was obtained against the executors of Thomas Burney, which being afterwards revived by *scire facias*, the whole tract was levied on, sold and duly conveyed by Thomas Buchanan, sheriff, to Willaim Brown, on the 24th July 1790, in consideration of 85*l.*—who afterwards conveyed the same to the lessor of the plaintiff on the 1st August 1794, in consideration of 250*l.*

The defendant's legal title was founded on a warrant to Joseph Howard, for 72 acres, dated 7th June 1770, adjoining his land bought of Thomas Mitchell, and lands of Thomas Burney, including an improvement made by Charles Stewart; interest to commence from 1st March 1758. On the 8th June 1770, 9%. was paid to the Receiver General; on the 14th of the same month, was paid to William Mac-
lay for the survey: and on the 2d July following, a survey was made
by Maclay of 72½ acres, the lands in dispute.

On the 29th May 1792, Howard conveyed to John M'Veagh, the defendant's landlord.

“ No evidence was given of Howard’s purchase of the claim of Stewart by improvement ; and a patent to M’Veagh, for adjacent lands, dated 11th February 1788, called for these 72½ acres as the lands of Burney.

A question was made at the trial, whether the sheriff's sale of the lands of Burney, on the judgment against his executors, was vitiated by the defect of an inquisition, condemning the property ; but the court thought there was no weight in that objection.—They were, however, divided, as to the pretensions of the parties to the equitable title by improvement ; Yeates thinking the claim of Netherer to be much preferable to that of Stewart, and Brackenridge, J. asserting a contrary opinion. But the great doubt was, whether such a survey was made for Burney, as was within the limitation act of 26th March 1785.

Messrs. Ingersoll and Sergeant, on behalf of the defendant, contended, that it appeared from the report, that Stewart's title by improvement was elder and better than Netherey's ; it commenced in 1755, and Stewart was forcibly expelled from the land in 1763. Burney's warrant and survey returned, evidently exclude the 72 acres, and it is even dubious whether they were included by the lines run by the surveyor, though he was allowed in his testimony to explain and indeed to contradict his official return. But if the 72 acres should be supposed to have been surveyed in 1766, still, as Maclay had sworn, it was but provi-

sionally run, and as a mere matter of indulgence. It was against the duty of the surveyor to strip a man of his improvement, and Burney engaged to give him notice when he effected his intended purchase. The condition was not performed on the part of Burney, which alone could effectuate the lines run on the ground ; and if a loss arises therefrom, it must be imputed to his own negligence. Maclay was his agent. His act in returning the survey is conclusive on his principal, where there has been no fraud or even mistake. The limitation act, (2 St. Laws 282. § 5) pre-supposes a right in the party who commences his ejectment, and cuts off all recovery, unless the provisions of the act be complied with. Here there has been no survey made for Burney, within the true intent of the legislature. The law requires a survey to have been actually completed ; an act already done, not to be done at a future day. The caveat has no legal effect ; it operates as a mere claim, like the bringing an ejectment ; it is not equivalent to the act of an authorized surveyor, giving possession of the premises, and sanctified by the lords of the fee. Upon the whole, it is apprehended, if there is reasonable ground to presume, that justice has not been done by the verdict, the court will grant a new trial, and not suffer the possession to be changed.

Mr. Duncan for the plaintiff, insisted that the court would not grant a new trial, if the verdict of the jury was according to the equity and justice of the case. It is true, the members of the court differed in opinion on the trial, as to who had the superior equitable right. But what kind of title can be derived from making a few rails on the land, in 1755, unaccompanied by a personal settlement ? What avails an intention to make an improvement, unless that intention is really carried into execution ? It is true, Stewart returned to the land in 1763, two years after Netheroy had built his cabin, and was living in it peaceably and had planted his corn ; and then he wished to make more rails, but was prevented. What shadow of claim he originally might have had, was abandoned by eight years absence, and his coming then upon the land, was as unjustifiable as if he had never seen it before. The union of force and fraud by Howard, in expelling Saltsman the tenant of Burney, from the possession, wears a different aspect. The will extravagant doctrines which prevailed before the revolution respecting improvements, are now sunk into contempt ; and a series of temperate decisions for twelve years past, have established residence on the land as the characteristic feature of a genuine improvement.

It will not escape observation, that previous to the survey made for Burney in April 1766, he had an execution levied on the improve-

ment of Netherey, returnable to the preceding January term, which gave him a lien on that property. He meditated a purchase at a future day, under his judgment; and if that should be effected, no injury would be done by including it in his survey; if the improvement was considered as abandoned, he might well survey it as vacant land. Maclay had some qualms of conscience in returning the poor man's improvements for Burney, but none whatever, in returning it for Howard, who must have known of the sheriff's sale. It is clear, that such lines were traced on the ground as would enable him to return the improvement for Burney; and his being examined as to what passed at the time of the survey, and what courses and distances he run, was neither irregular nor unusual. Whether a survey was made for Burney, of the lands in dispute, was a fact submitted by the court to the jury; and they having found the fact, the case is taken out of the limitation act. The entry of a caveat is in many instances equivalent to the execution of a survey: it is more than a mere claim, because a survey actually made for one, may be ordered to be returned for the adverse party. Burney was well advised when he entered this caveat: the decision of the board was long after his death, and on *ex parte* hearing; the jury were bound to do what the board of property ought to have done, on a full investigation of the merits. Maclay must have furnished Howard with materials to take out his warrant, from his calling for the precise quantity of 72 acres, and most probably informed him of all the particulars. Howard could not have been deceived by the return of Burney's survey, for he must have seen the marked lines on the ground. When we advert to the dates of the warrant, and receipt for the surveying fees, and the supposed time of survey for Howard, we are naturally led to conclude that the only survey made of the lands in dispute, was really effected at the instance of Burney, and at his expense.

Shippen, C. J. So much was left to the jury, on the fact of the survey, at the time of the trial, that I see no reason to set aside the verdict.

Yeates, J. The equitable title by improvement and settlement, I thought at the trial, and still think, was in the plaintiff claiming under Daniel Netherey, and not in the defendant claiming under Charles Stewart, if he really sold his pretensions. But there having been no previous possession within seven years next before the bringing of the actions, the plaintiff was barred from recovering under this claim by the act of limitations.

The jury have found by their verdict, that a survey of these lands was made for Barney. That fact was submitted to them,

and being established, the case is taken out of the limitation act.

But as the survey returned excludes the lands in question, if Howard laid out his money, being led thereto by the return of survey, and knew nothing of what had been done, I should be of opinion, that the defendant was concluded by his return. No evidence was given when the survey was returned; and there are facts and circumstances which exist in the case, from which the jury might rationally infer, that Howard was appraised of the legal title of Burney to these lands. The marked trees on the ground; the warrant of Howard calling for the precise quantity of 72 acres, and stating the improvement of Stewart to commence from the 1st March 1758, the time of Burney's supposed improvement: the receipt, for the surveying fees six days after the Receiver General's receipt, as of a survey made, when the draft purports it to have been made eighteen days afterwards, viz: 2d July 1770, when united together, form a mass of circumstantial evidence, which might induce the jury to believe, that Howard well knew of the previous transactions. I am not authorized to say this conclusion was unwarranted; and under this impression I cannot assert that injustices has been done. I therefore am of opinion, that the motion for the new trial should be denied.

Smith, J. The judge who tried the cause having expressed his satisfaction with the verdict, I concur in opinion that no new trial be granted.

Brackenridge, J. The case is out of the limitation act, there having been a survey. I lay the return of the survey out of the case, and I think now as I did at the trial.

Judgment for the plaintiff.

PETER LEGAUX, *quer.* in error, *against* ISAIAH WELLS.

In replevin by P. L. against I. W. the jury who tried the cause were returned by I. W. The court on error cannot presume that the defendant and sheriff are the same person, unless it appears on the record. But if it so appeared, and the plaintiff did not challenge the array, he comes too late to assign it for error.

THIS was a writ of error to the Common Pleas of Montgomery county. General errors were assigned.

It appeared by the record that the suit was replevin. The defendant, Wells, justified as the bailiff of William Richardson Atlee, esq., the distress of the goods for rent in arrear. The plaintiff replied no rent

was due ; and in November term 1801, the jury found a verdict for the defendant for 27*l.* 11*s.* 2*d.*

On the general *venire facias*, the jury appeared to have been summoned and returned by Isaiah Wells, sheriff. But whether he was the defendant or not, did not appear by any part of the record.

The argument commenced at the last term, and was again resumed this term.

Messrs. T. Ross and Frazier for the defendant. How will the court be satisfied, that the defendant and the sheriff are the same person ? It only can be collected from the record. It is sufficient for us to deny the fact. It lies on our adversary who makes the exception to verify it, or he must fail.

But if the sheriff was really the party, the array ought to have been challenged by the plaintiff in error before the jury were sworn. Hob. 235. Bull. 307. One shall never have error of such thing, of which he might have advantage by plea, if it does not appear by the record. 10 Vin, 2 pl. 1. If the sheriff is the brother of the party, the challenge must be made at the time, or error lies not ; (*Ib.* pl. 2) or if no hundredor was on the panel. *Ib.* pl. 3. So if the bailiff returns the whole panel, where the sheriff ought to have returned part. *Ib.* pl. 4. If one loses in a court of ancient demesne, he cannot assign for error that it was frank fee, because he affirmed the jurisdiction. *Ib.* pl. 5. If an alien recovers, the defendant cannot assign it for error, if he did not take the exception in the first action. *Ib.* pl. 6. No one shall assign for error what might have been pleaded in abatement. Carth. 124. The advantage must be taken at the proper time. Cro. El. 582. 1 Rol. Ab. 781. Ab. pl. 1, 2, 3, 4. Whoever does not object at the time shall be supposed to acquiesce. 3 Burr, 1858. And in all such cases the consent takes away error. 10 Vin. 11. pl. 1, 2, 3. Where the prosecutor in a criminal case, summoned the jury as sheriff, it was determined that the exception should have been taken at the time by way of challenge, and that it could not be moved afterwards in arrest of judgment. Conrad Sheppard's case. Leach's Crown Law 105. It is presumed, that authority establishes the doctrine we contend for. And the court there were bound to take notice that the sheriff was the prosecutor. But it is not so here ; for the court can know the fact judicially only from the record. The court will intend nothing against the verdict. 3 Burr. 1728.

Mr. Ingersoll for the plaintiff in error. The court are asked to distinguish between Isaiah Wells, the defendant, and Isaiah Wells, the sheriff. The presumption is that they are the same

person, unless the contrary be shown, or that there are really two men of that name in Montgomery county. The venire being general, it could not appear by the record conclusively, by any words of reference that they are but one person.

Here then one of the parties is the returning officer, from whom we are to expect an impartial jury. Every principle of justice is abhorrent to it.

The case in 3 Burr. 1858, proves nothing. The party made the objection, and it appeared on the record. Where the exception appears on the record, it may be taken advantage of afterwards, as appears from the cases cited from 1 Rol. Abr. 781-2 and 10 Vin. 2, which are taken from 3 *Ib.* 4. 6. b. The defendant's doctrine goes too far; it sweeps off almost every matter which may be urged for error.

In replevin, the defendant is an actor as well as the plaintiff, and may take out the *venire facias*. The jury must be returned by the proper officer, and it must be entered *ex assensu partium*. Co. Lit. 125. a. b. 2 Danv. Ab. 76. pl. 14, 83, pl. 5. If there be a *venire* from the wrong county, though no advantage be taken at the time, it is still fatal. 6 Co. 14. A *venire facias* awarded improperly in an inferior court is erroneous. They have no power to alter the forms of writs. 10 Vin. 69, pl. 4, 5, 6. L. Raym. 417.

Shippen, C. J. declined giving any opinion, as he had not heard the first argument.

Yeates, J. The general rule of law unquestionably is, that none of the parties to the suit should return the jury. Here it is assumed by the plaintiff in error, that Isaiah Wells, the sheriff, who summoned and returned the jury, was the Isaiah Wells, the defendant, who as bailiff of William Richardson Atlee, distrained the goods of the plaintiff Legaux for rent. That point does not judicially appear to us, nor can we infer it from record. But admitting the fact, after the plaintiff has let slip the opportunity of challenging the array, shall he now be admitted to assign the fact for error, of which he neglected to take advantage in due time?

The objection in the present instance is merely technical, Mr. Atlee being the real defendant. The plaintiff has taken his chance of the verdict. He could not but know who was the sheriff of the county wherein he lived, and he had an opportunity of taking advantage of this matter according to the reasoning of the court, in the case of the company of mercers and iron mongers of Chester v. Bowker, 1 Stra. 70. Com. Rep. 248. And it is no cause to grant a new trial that

one of the jurors was related to one of the parties, according to 1 Vent. 80. Sty. 100. 129. 12 Mod. 584, unless the opposite party had not timely notice of it. 7 Mod. 54. 11. Mod. 114. 2 Salk 645; although I confess in Comy. 602, a new trial was granted, though the cause of challenge was known at the trial.

So an objection, that witnesses are interested, should be made at the trial, and if discovered afterwards, is not itself a ground for granting a new trial, though it will have its weight, where the party has merits. 2 T. R. 717. And a new trial will not be granted, for matter omitted to be insisted on, at the former trial. 10 Mod. 202. 1 Stra. 691. 1 T. R. 84, 85. 2 T. R. 120. These cases have, in my idea, a very considerable analogy to the present; and the authorities cited by the defendant's counsel, from 10 Vin. 2 pl. 1. to pl. 6, and Leach's Crown Law 105, strongly evince the propriety of affirming the judgment.

Upon the whole, I cannot see any good grounds on which we can reverse the judgment, under the circumstances of the case.

Smith, J. Sheppard's case in Leach 105, is strong in point. In Hesketh v. Braddock, 3 Burr. 1858, Lord Mansfield observes, in the case of Bodwick v. Fennel, it was stated at the bar, "that no exception or challenge was taken." And as a party, may waive all exceptions if he pleases, if he does not object, it is a virtual acquiescence.

Should it be objected, that it may be averred, that the defendant and sheriff are the same person, I answer, that the cause of challenge then appears on the record; and it being then omitted, it is now too late, after taking the chance of having a verdict, for the plaintiff to avail himself of it in error. But it does not appear on the record that the avowant is the same person as the sheriff who returned the jury. Presumption in such a case is not admissible. In error the court can presume nothing; they must be guided entirely by what appears on the record.

Brackenridge, J. concurred.

Judgment affirmed.

STEPHEN SHEWEL surviving partner against JOSEPH FELL, esq.

In debt against a sheriff for an escape, parol evidence that he did not take the prisoner until after the return day of the *ca. sa.* which was returned "in custody," is not admissible

In debt for an escape, on *ca. sa.* the jury must find the who's debt and costs.

The statutes of Westm. 2. (13 Ed. 1 c. 11. and 1 Ric. 2. c. 12,) concerning escapes, extend to Pennsylvania.

THIS cause was tried at Newtown for Bucks county, on the 12th June 1800, before Shippen, C. J. and Yeates, J. at the Circuit Court.

The suit was in debt against the defendant, as sheriff, for the escape of Robert Shewel, on a *ca. sa.* who was soon after liberated from his confinement, as an insolvent debtor. The defendant offered to show, that he had not taken the person of the debtor under the *ca. sa.* until the third day of the term to which the process was returnable, and that his return of him "in custody," was founded on a mistaken This testimony, the court overruled, as it would contradict the sheriff's return; and the jury, with considerable difficulty, grounded on the great hardship of the case found a verdict for the plaintiff, for 933*l.* 14*s.* 7*d.*, the whole debt. It was then agreed, that a motion for a new trial should be entered, and overruled by the court, and judgment entered for the plaintiff on the verdict without prejudice to the defendant, on the questions of law, which were intended to be discussed on an appeal, before the whole court.

The following reasons were assigned and certified by the counsel, in support of the appeal.

1. A new trial ought to have been granted, as the court upon the trial, refused to permit the defendant to give evidence, that the return of *cepi corpus* on the *capias ad satisfaciendum*, was made by mistake; and that Robert Shewel for whose escape in execution this action was brought, was never legally in his custody.

2. A new trial ought to have been granted, as the court upon the trial refused to permit the jury to take the particular circumstances of the case into consideration, and regulate the amount of their verdict according to the nature and degree of the defendant's negligence, and the damages actually suffered by the plaintiff in consequence thereof; but charged them positively to find for the plaintiff to the full amount of the debt and costs in the former suit: whereas the whole case should have been submitted to the jury, with directions to measure the amount of their verdict according to the nature and degree of the defendant's negligence, and the damages actually sustained in consequence thereof, by the plaintiff.

3. The judgment should have been arrested, as the action of debt does not lie in Pennsylvania, for an escape in execution, the provisions of the statute of Westminster, which gives the

action in England, being altogether unsuitable to the situation, and circumstances of this country, and therefore not extending here.

The case was argued on three different days, viz. December 30th, 1802; March 17th, 1803 and December 23d, 1803. by Mr. T. Ross, on the part of the plaintiff, and by Messrs. Ingersoll and Condry, on the part of the defendant.

The argument on both sides, was conducted on the same system of reasoning, as at the Circuit Court, which is not intended to be repeated here: but several new authorities were cited.

On the first point, the defendant's counsel contended, that the parol testimony ought to have received, and put several cases by way of illustration. If there should be two persons of the same name, and one of them is arrested wrongfully, shall the mistake of the sheriff be conclusive either on him or the party? How long shall the injured party be continued in confinement? Suppose an arrest on Sunday by an ignorant bailiff, or after the return day of the process, as we take to be the present case, shall the superior officer, as well as the injured person, be concluded and estopped thereby? Estoppels are not to be favored in general; they prevent an investigation of the truth of the case. 4 T. R. 254. It is a general rule, that deeds and other writings must be judged of by their own words; yet in cases of fraud or mistake, parol evidence will be received. Where a person is concluded by the sheriff's return, it is on the ground that he has remedy against the sheriff. In England, the general return "of goods levied," will bind a sheriff to the amount of the debt and costs: but this will not be pretended to be the case in this state; because, by the constant practice, should all the goods be levied and fairly sold, and the amount carried to the plaintiff's credit, the sheriff may show the same in evidence, and discharge himself from further responsibility.

The plaintiff's counsel answered, that the admission of a sheriff to contradict the return he had made, would be attended with the most dangerous consequences. If any error should be committed by him in his returns, the court to which the process was returnable, could alone direct the correction of it. In the instances put by the defendants' counsel, if the sheriff should knowingly arrest a wrong person, and obstinately persist in it by adhering to his return, he would conclude himself thereby; but in that instance, as well as the Sunday arrest, the court, on a proper application, under the superintending summary powers which they clearly possess over all their officers, would give redress to the injured party; or in a disputed case, would refer him to his remedy against the sheriff. In England, if a sheriff returns goods levied to such a value, he must answer to that va-

return goods levied to such a value, he must answer to that value. 7 Mod. 118.

On the second point, the defendant's counsel cited the words of Buller J. in *Planch v. Anderson*, 5 T. R. 40. In debt on the statute against the sheriff for an escape out of his custody in execution, the plaintiff may (without considering how far he must) recover the whole debt. This would seem to imply a doubt on that head. In *Johnson v. Macon*, 1 Wash. 6, it is said by Pendleton, president, escapes which in England are fixed upon the sheriff from legal deductions, seem to be done away in this country, by the act of assembly, which subjects the sheriff, only when the jury expressly find that the debtor escaped with the consent, or through the negligence of the officer. In Connecticut, case lies only against officers in all cases of escape, whether on mesne process or execution. 2 Swift's Syst. 112. The courts there adopt the principle, that they may take into consideration, the circumstances and ability of the person escaping. *Ib.* 113. A plaintiff in debt may now recover less than he declares for, though it was formerly otherwise. 2 Bl. Rep. 1221. 3 Woodes. 95.

To this it was answered, the expressions, of Buller conveyed no doubt, but leave the point at large. He had asserted his decided opinion before, that the plaintiff must recover, in such case, the full debt; 2 T. R. 129, and the same doctrine is explicitly laid down in 2 Bl. Rep. 1048, and in 3 Bla. Com. 164. The writ of *capias ad satisfaciendum* is a writ of the highest nature, and when once executed, no other process can be sued out against the goods or land. Sherid. B. R. 316. But though it is so at law, sequestration may issue in chancery. Talb. Cas. 222. Ambl. 79. An omission of the sheriff's return shall not be amended, 5 Co. 41. b., as if the *habeas corpora* be *album breve*. Mo. 868. The sheriff's return shall conclude him. 10 Vin. 78 pl. 4. Cites Bro. *return de brief*. pl. 107, who cites 7 Hen. 4 11. On two extents levied, the sheriff was not allowed to amend his returns. Bunb. 323. Indorsement of N. E. I. on a *ca. sa.* is good evidence that the sheriff received it. Cowp. 63. Debt does not lie at common law for an escape, being given by statute. 1 Show. 376. But the plaintiff may now maintain either case or debt for an escape in execution. 3 Bac. 246. Cro. Jac. 288. 2 Bulst. 321. Cro. Eliz. 767.

The third point was fully advocated by the defendant's counsel. They insisted, that the statutes of 13 Ed. 1. c. 11. (commonly styled Westm. 2.) and 1 Ric. 2. c. 12, were enacted in England, on grounds merely local, and confined to the policy of that kingdom. The first of them, which respected "the masters" remedy against their servants, Yeates, Vol. IV.

and other accomptants," is to be found in 1 Ruff. stat. 90, and is commented on in 2 Reeve's Engl. Law 178. The second, which is pointed in express terms to the Warden of the Fleet Prison, is to be found in 1 Ruff. Stat. 337, and is commented on in 3 Reeve's Engl. Law 205. Buller J. remarks in 1 T. R. 132, that the former, by a liberal construction has been held to extend to all cases, and the latter to all gaolers. It is a liberality of extension not justified either by the words or spirit of the two statutes, and which he admits, "never have been, nor can be construed literally."

By the statute of Westm. 2, servants and receivers found in arrearages upon accompt are to be delivered to the next gaol, and imprisoned in irons under safe custody; and the sheriff or keeper of such gaol is to take heed, that if he suffer him to go out of prison, and thereof be convicted, he shall be answerable to his master of the damages done to him by such his servant, according as it may be found by the country, and shall have his recovery by writ of debt. The statute of 1 Ric. 2. c. 12, ordains, that no Warden of the Fleet shall suffer any prisoner to go out of prison without making gree to the parties of that thereof they were judged, &c. It is clear therefore, that both acts meant only to provide against voluntary escapes, whatever construction may since have been put on them; and that it was intended, that the jury should judge of and decide on the damages which the plaintiff has received. The latter remark is properly referable to the second head of argument, and such is the received law both in Virginia and Connecticut Christian in note 20. to 1 Bla. Com. 88, says, it has been held, that the same words in statutes will bear different interpretations, according to the nature of the suit or prosecution instituted upon them, 2 Bl. Rep. 1226, which in plain terms, means, that acts of parliament have sometimes been carried beyond the natural import of their words. It requires an antiquarian to decypher the object of the statute of Westm. 2, and 1. Ric. 2. c. 12, but it is apprehended, he would never discover that the sheriff must necessarily pay the whole debt, in every supposable case, of a party escaping out of execution.

But a previous question must be determined, whether these statutes are in force in Pennsylvania? It lies on our opponent to establish the affirmative of this proposition. It will not be pretended, that there has been any decision of that point upon argument. If some few actions of debt have been brought upon escapes on judicial process, they have all passed *sub silentio*: and usage of a slight nature shall not control in a matter of so great and general moment. General warrants were also in use many years before their radical defect was ascertained. Our opinion is fortified by the sentiments expressed by M'Kean, C. J. in the case of Benjamin Fuller v. James Ash, esq. sheriff of Philadel-

phia county, tried here in September term, 1795. He particularly reprobated the adoption of the resolutions of the British courts of justice since the revolution. Great latitude was allowed, as to the evidence adduced by the sheriff on that occasion ; and the case has not since been revived.

It is declared in the preamble of the act of assembly, passed 31st May 1718 (1 Dall.St. Laws 133) that acts of parliament do not extend to the plantations, unless they are particularly named in such acts ; but this relates to statutes enacted after the settlement of the colonies. In *Morris's lessee v. Vanderen*, the court laid down the rule, that the common law of England had always been in force in Pennsylvania ; that all statutes made in Great Britain before the settlement of Pennsylvania, had no force here, unless they were convenient and adapted to the circumstances of the country ; and that all statutes made since the settlement of Pennsylvania, had no force here, unless the colonies were particularly named. 1 Dall. 67. The statute of 32 Hen. 8 c. 9, against maintenance and embracery, and the limitation act of 21 Jac. 1. c. 16, were held not to be in force here ; but it was otherwise held as to the statute of limitations of 32 Hen. 8. c. 2. *Ib.* Judge Tucker in his appendix to 1 Bla. Com. 393, seems to hold, that legislative provisions are necessary to the extension of the British acts of parliament.

It will be recollected, that when the statutes in question were enacted, the parliaments were at the devotion of the monarchs, and the barons and magnates of the kingdom were all-powerful. There were strong fortresses in every country, wherein prisoners might be kept in safety. The *posse comitatus* could be readily collected to repress any attempt to break the gaols ; and in England, on a breach of gaol by an armed force, the sheriff may have his remedy over against the hundred. In all these particulars, our local circumstances vary. We possess a greater equality of power and rights ; we have even log gaols in some of the counties, and no gaols very secure ; our posses cannot easily be raised ; and the sheriff has no remedy against the hundred or township. We may therefore well say, that the extension of these statutes, is neither convenient, nor adapted to the manners, customs, or general policy of this country, and that the correct rule in all cases of actions brought against officers for neglect or misdemeanor in office, is, to proportion the recovery to the delinquency of the officer and the peculiar circumstances of every case. This is the true line of justice, and accords with the principles of the common law. At common law, debt would not lie for an escape ; nor since the statutes, would it lie against the warden's executors for an escape ; unless he

had been thereof convicted in his life-time. It was personal negligence in him. Dy. 322, *b*.

The plaintiff's counsel answered, that the court had nothing to do with the municipal regulations either of Virginia or Connecticut. It might not suit the genius or spirit of those governments to extend certain acts of parliament, when it might perfectly accord with the general systems of other states to adopt them. It is of no moment, that no decision can be quoted, wherein these statutes have been adjudged to extend upon full argument. The point was never seriously made a question of until now; and that statutes may be extended by practice, is universally admitted amongst us, let the opinion in Virginia be what it may. The fact is incontestible, that both before and since the revolution, debts have been recovered under the operative effect of the statutes in question, in many instances; and they have been extended by practice and acted under, ever since the settlement of Pennsylvania. By the 6th section of the royal charter to William Penn, it is provided, that the English laws shall be in force in Pennsylvania, until the same be altered by the legislature. 1 Dall. St. Laws. Append. 3. Antiquated as the statute of Westm. 2, may be supposed to be, the penalties therein prescribed are indispensably necessary to secure the faithful execution of the duties of sheriffs. It cannot be said to be inconvenient or unsuitable to our situation or local circumstances. By the act of 28th January 1777, such as the statute laws of England, as had theretofore been in force in the province, are declared to be binding on the inhabitants of this state. 1 St. Laws, 723. At common law, a common person could not have taken the body of his debtor in execution for his debt, but that power was given by the stat. 25 Ed. 3, 17. Godb. 290. 10 Vin. 583, pl. 20. 2 Bac. 239. No reason can be given why this statute should be extended, which will not hold as to those under consideration. The party transgressing the provisions of a penal statute, is bound by the fundamental contract of society, to obey the directions of the legislature, and pay the forfeiture incurred, to such persons as the law requires. 3 Bl. Com. 159. Credit cannot be supported unless the payment of a just debt can be enforced by the pain of imprisonment. A bond given to a sheriff, to indemnify him against the voluntary escape of his prisoner is void by the common law. 10 Co. 100. 1 Bos. and Pull. 277. In an action *qui tam* for usury, the plaintiff recovers the whole debt, though the case may be supposed to be hard. And no instance can be shown, where less than the whole penalty is recovered on a penal statute.

The court continued the case under advisement, their only doubt being, how far the practice had extended the statutes of

13 Ed. 1, c. 11, and 1 Ric. 2, c. 12. On this point, they proposed to enquire for themselves.

And this term, Shippen C. J. declining to give the opinion of the court, as he was not present at the last argument, (though he fully concurred with the other justices,) Yeates, J. delivered the opinion of the court as follows :

The first point made in this case, seems to admit of little doubt. The assertion that a sheriff or ministerial officer may explain or contradict his returns of "goods levied," "lands sold," or "in custody," on suits brought against him, founded on these returns, and while they remain in full force, and unaltered, sounds strangely, and appears unwarrantable. If a mistake has been made in a return, which ought to be corrected, the application for relief should be made to the tribunal from which the process issued, and into which it is returnable. They in their discretion, can only grant the relief prayed for, in case the attendant circumstances warrant such interposition.

The second and third points may well be considered together. That the statutes of Westm. 2, and 1 Rich. 2, have been long practiced under, I well know. My own experience on the subject, extends back above forty years ; and I then took it to be generally understood, that the practice had obtained long before my time. The act of 28th January 1777, declares, that such of the statutes as have been in force in the late province, should remain in force until altered by the legislature. In the language of the late chief justice, 1 Dall. 75, "we know that many statutes for near a century, have been practiced under in the late province, which were never adopted by the legislature ; and that they might be adopted by usage, and so become in force, is very clear." There was no decision in *Fuller v. Ash*, tried here in September term 1795, which the defendant's counsel have so much relied on ; though in consequence of what dropped from the then chief justice, the plaintiff's counsel submitted to a nonsuit, with liberty to move for a new trial. If these statutes are considered as convenient and applicable to our local circumstances, they will fall within the general rule of statutes made before the settlement of the colonies extending here. And why are they not thus convenient and applicable ? If the policy of the law allows imprisonment for debt, a slight acquaintance with judicial proceedings will assure us, that it cannot be carried into effect, unless a rigid rule is adopted, whereby the conduct of ministerial officers may be strictly examined. We are taught by experience, that severe penalties are indispensably necessary, to exact the faithful performance of the duties of sheriffs.

If these two acts of parliament form a part of our civil code, the adoption of the English decisions under them forms a necessary consequence, at least, of those resolutions, which took place before the American revolution. Should it be objected, that hard cases may happen by reason hereof, I admit the objection, and freely concede that this is one of them. But I answer, that general laws cannot be so formed, as to exempt each particular case from inconveniences. It would be a greater mischief to have no general rule, whereby we may accurately judge of the conduct of public officers, in whom such extensive trust is reposed.

To leave the nature and degree of a sheriff's negligence of judicial process, and the damages actually suffered by the plaintiff in consequence thereof, to the opinion of a jury, according to their discretion, without any known, or established rule, would, in our ideas, introduce the utmost uncertainty, and be attended with the most fatal consequences in the administration of justice: and if any judgments have been obtained against sheriffs, for escapes on judicial process, within the last seven years,* they must necessarily be reversed, according to the doctrine advocated by the defendant's counsel, on writs of error; which would be a great evil.

Whatsoever our personal feelings may be, under the circumstances of the present case, we find ourselves constrained to decide in favor of the plaintiff, for the whole debt recovered by the verdict.

Judgment for the plaintiff.

* No writ of error or appeal shall have effect, unless brought within seven years, &c. By act of assembly of 18th April 1791. 8 Dall. St. Laws 99.

TIMOTHY PEACEABLE lessee of JOHN ROSS and JOHN VAUGHAN *against* JOHN EASON and ROBERT EASON.

A special verdict must find the facts distinctly; but on a demurrer to evidence, the evidence only is stated, yet if it be by parol, and the effect of it be doubtful, all the facts which the evidence tended to prove, or which the jury might infer from it, are thereby admitted. The party may insist at the trial that his adversary demurring shall confess such facts on record: But if this is not done, the court will consider every thing as admitted, which the judge who tried the cause would have done, in order to compel a joinder in demurrer.

A special license to survey lands cannot be retracted; and though the purchase money is not paid or tendered, it will not invalidate the grant.

EJECTMENT for lands in Northumberland county.

The cause was tried at Sunbury, on the 17th October 1796, when the plaintiff's counsel demurred to the evidence given by the defendants.

The record was as follows:

Afterwards, to wit, on the day, and at the place within contained, before the Honorable * Jasper Yeates, esq. and the Honorable Thomas Smith, esq., two of the judges of the Supreme Court of Pennsylvania, came as well the within named Timothy Peaceable, by Charles Smith his attorney, as the within named John Eason and Robert Eason by Thomas Duncan, their attorney; and the jurors of the jury, whereof mention is within made, that is to say, Peter Furst, &c. being called likewise came and were chosen, tried, and sworn, to say the truth of the premises within contained; and the said Timothy Peaceable to prove his right, produced in evidence, the following matters of record:

1. An application of colonel Turbutt Francis, dated 8d February 1769, in behalf of himself, and the other officers of the 1st and 2d battalions of the Pennsylvania regiment, for 24,000 acres of land, to be seated, and divided amongst them, according to their agreement among themselves, and the concession of the proprietaries.

2. The order of governor John Penn and the Board of Property thereon, dated the said 3d February 1769, agreeing to the application, except that colonel Clayton should have no share thereof, and that the said 24,000 acres should be taken up in bodies of 8000 acres each.

3. A survey of 246 acres and allowance, made for Jacob Kern, on the 24th May 1769, on the west branch of Susquehannah, then in Berks county.

4. A warrant of acceptance to Jacob Kern of the tract of 246 acres reciting a division of the lands surveyed amongst the officers, and that this tract fell by lot to captain Kern, dated 9th May 1774.

5. A patent to the said Jacob Kern for the premises, in consideration of 12*l*, 6*s*. sterling, dated 15th June 1774.

6. A deed from the said Jacob Kern for the premises, to John Witmer, in consideration of 650*l*., dated 8th August 1783.

7. A deed from John Witmer aforesaid and wife, and Mathias Slough, of the first part, John Witmer and Henry Witmer, of the second part, with special recitals therein, for the premises, to the aforesaid John Ross and John Vaughan, the lessors of the plaintiff, in consideration of 674*l*. 10*s*., dated 9th September 1785.

Whereupon the said John Eason and Robert Eason show in evi-

*Yeates J. was originally of counsel for the plaintiff, and took no part in the cause when a new trial was awarded in April term 1791, or in any subsequent stage of the suit.

dence to the jury aforesaid, to prove and maintain the issue within joined on their part, the following book, papers, records, and parol evidence, viz.

1. The book of minutes of the board of officers of the 1st and 2d battalions of the Pennsylvania regiment, kept by general James Irwin, who was duly appointed their secretary for that purpose, in *hæc verba*.

[By this book, it appeared among other things, that on the 8th September 1764, the officers who served under colonel Francis, came to an agreement to make application for a special order to take up lands, in consideration of their services during the war, and subscribed certain sums for that purpose.

On the 28th March 1765, two officers were appointed commissioners to make application to the governor.

On the 28th June 1765, it was agreed, that the officers absent on duty should be included in the application, excluding those who had refused to sign at Bedford on the 8th September 1764; and the amount of an ensign's subscription was fixed at 4l.

On the 21st January 1769, colonel Francis made report to the officers of the governor's terms upon the application made to him, which the officers accepted on the 26th January, and the written terms were fixed by the order of the governor and Board of Property on the 3d of February following, as before stated.

Surveys were made thereon in March and April, of lands in the forks of Susquehannah, and on Bald Eagle Creek, and in Buffalo Valley, but there remained a deficiency of 419 acres to complete the proportions of all the officers. The allotment of each ensign, of the lands surveyed in the forks of Susquehannah and Buffalo Valley, was 246½ acres, and on Bald Eagle was 216 acres. Ensign James Morrow (under whom the defendants held as tenants) was one of the officers, for whom the original application was made.

On the 16 May 1769, all the officers (except ensign Morrow) and the surveyors, met at Harris's ferry, to divide the lands surveyed, which they agreed to do by way of lottery. Previous to the drawing thereof a letter from James Tilghman, esq. secretary of the Land Office, was read to the officers, wherein it was stated, that ensign Morrow, having been charged with the rescue of one Stump, and a certain Ironcutter, who had been committed for the murder of certain friendly Indians on Middle Creek, from the gaol of Cumberland county, the governor had ordered that he should be excluded from any share in the lands, until the innocence of the crime should be ascertained.

The officers agreed, that his share should remain suspended, until he should clear himself of the offence ; but his lot was in the meantime drawn as well as the other officers, and he drew the lands in question.

One fifth of each officers monthly pay was estimated as his share of the expenses, and an ensign's proportion was fixed at 4l. It appeared a balance was carried out against Morrow of 3l. 4s., and therefore 16s. must have been paid on his behalf.

The deficiency in the lands surveyed, being afterwards discovered, the officers wholly excluded ensign Morrow from any share, and the lands in question, marked No. 8, were assigned to captain Jacob Kern on the 14th November 1772.

In the course of the same month, the accounts of the different officers respecting the lands, were settled by persons appointed for that purpose, and finally closed.]

"2 and 3. The application of Colonel Francis, and the order of the governor, and Board of Property thereon, dated 3d, February 1769, before stated.

4. The field notes of a survey, made by William Scull a deputy surveyor, for ensign Morrow, of the lands in question, containing 246 acres and allowance, on the 24th May 1769.

5. A certificate of sundry surveys on Bald Eagle creek, whereby 216 acres, part of the larger survey, were allotted to ensign Morrow.

6. And they also proved by the oath of a certain Walter Clark, a juror on a former trial between the said parties, that a certain Reuben Haines, whose deposition was read on the said trial, but which is now lost, and the said Reuben Haines, is dead, did in the said deposition prove, that he attended a meeting of the board of officers of the 1st and 2d battalions of the Pennsylvania regiment, at the sign of the Indian Queen, in the city of Philadelphia, about the end of February or beginning of March 1774, as agent for and on behalf of ensign Morrow, and that he tendered to the said Board of Officers, for, and on behalf of the said Morrow, the money for patenting the land in dispute which was refused by the said officers. And also by the oath of a certain Thomas Hewit, that the said ensign Morrow, rented the land in dispute, to the aforesaid John Eason, in 1772, and that the said Eason took possession of the land in consequence of the said agreement, and that he saw said Eason living on the land in a cabin, in 1773.

And the said Timothy Peceable saith, that the aforesaid matter to the jurors aforesaid, in form aforesaid, shown in evidence by the said John Eason and Robert Eason, is not sufficient in law, to maintain the said issue within joined on the part of the said John Eason

and Robert Eason ; and that he, the said Timothy Peaceable, to the matter aforesaid, in form aforesaid, shown in evidence, hath no necessity, nor is he obliged by the laws of the land to answer, and this he is ready to verify. Wherefore for want of sufficient matter in that behalf, shown in evidence to the jury aforesaid, the said Timothy Peaceable prays judgment, and that the jury aforesaid, may be discharged from giving any verdict on the said issue, and that his damages, by reason of the trespass and ejectment within complained of, may be adjudged to him, &c.

And the said John Eason and Robert Eason, for that they have shown in evidence to the jury aforesaid, sufficient matter to maintain the issue on their part, and which they are ready to verify, and forasmuch as the said Timothy Peaceable doth not deny, nor in any manner answer the said matter, pray judgment, and that the said Timothy Peaceable may be barred from having his aforesaid action against them, and that the jury aforesaid may be discharged from giving their verdict upon the issue joined. &c. Wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict thereupon," &c.

When the counsel for the plaintiff at the trial demurred to the evidence, the counsel for the defendant contended, that he was not obliged to join in demurrer, unless the plaintiff confessed by his demurrer, all matters of fact alleged by the defendant, and to which any evidence had been given, to be true ; so that the question for the consideration of the court was, whether the evidence given was such as ought to be left to the jury.

And Smith, J. declared, that the objection should be fully considered, on the argument of the demurrer, before the court in Bank.

The merits of the conflicting titles were fully argued on the demurrer to evidence, in Bank, on the 26th December 1797, by Messrs. E. Tilghman and C. Smith, for the plaintiff, and Messrs. Ingersoll, M'Kean and Duncan, for the defendants ; and on the 22d March 1799, Mr. Ingersoll moved, that a *venire facias de novo* should issue, to ascertain with precision all the facts, out of which the law would arise. This motion as argued on the 24th March 1800.

Arguments for the defendants. This is a strong instance of an attempt to withdraw a question of fact from the cognizance of the jury, and transfer it to the court. By the 9th section of the 9th article of the state constitution, no one shall be deprived of his life, liberty or property, unless by the judgment of his

peers, or the law of the land. 8 Dall. St. Laws, Introd. 84. In King and Poole, Lord Chief Justice Hardwicke lays down, that it is of the greatest consequence to the law and the subject, that the powers of the judge and jury are kept distinct ; that the judge determine the law, and the jury the fact ; and if ever they come to be confounded, it will prove the confusion and destruction of the law Annal. 28.

The demurrer only goes to compel a statement of the facts, and unless they are stated correctly, the defendants are not bound to join in demurrer.

A mass of evidence is spread on the record, from which the jury might constitutionally and justly have deduced the most material inferences, and which the court are prevented from doing. They cannot legally form any conjecture of the deductions which the jury might have made, from all the evidence, both positive and presumptive. No fact is precisely stated to have been ascertained by proof, except the tender of the money to the Board of Officers, and the taking possession of the land, by ensign Morrow. Whereas the jury might well collect from the field notes of Scull, that the survey had been made for Morrow on the 24th May 1769, by the assent of all his brother officers, notwithstanding what had passed at Harris's ferry, eight days before. The court cannot ascertain facts, which may arise from a variety of circumstances ; they cannot infer a conversion, from a demand and refusal stated in evidence ; nor from facts shown in evidence, on a suit upon a policy of insurance, can they pronounce whether the vessel underwritten, was sea-worthy or not. The counsel on the former argument, have drawn different conclusions from the evidence, which forms part of the record. The court are not competent to decide between them, as a jury may well do. The minutes of the Board of Officers were read in evidence to supersede the attendance of the secretary, who otherwise must have proved the facts, *viva voce*. The book therefore, must be considered in the mere light of oral testimony. From the facts contained in it, the jury might conclude, that ensign Morrow rendered services to the government, and was a meritorious officer ; that he joined in the application, and was considered uniformly by his brother officers, as entitled to his proportion of the lands ; and that he paid his quota of all expenses, and his exclusion from the benefits of the grant was never considered as a serious act.

The present case may be compared to Clark v. Russel in error in the Supreme Court of the United States, August term 1798. The record came before the court in so loose and imperfect a state, that they ordered a *venire facias de novo* to issue, as the deposition of William M'Whaun taken under a commission, which was made part of the record,

only stated a fact, but not the inference deducible therefrom. 3 Dall. 415. There is a plain difference between facts ascertained, and evidence conducing to prove them. The demurrer to evidence happens where doubts arise in law, concerning the legal consequences arising on facts, 8 Bla. Com. 878. It is of no moment whether the defendant's counsel made their conclusions at the trial or not; they should have been called upon for that purpose. It is sufficient, that they objected in writing to the drawing up of the demurrer in its present form, and were promised every advantage which could be derived from their objections at the time, upon the hearing. If even they intended to deceive the adverse counsel thereby, which cannot be pretended, the defendants ought not to be injured thereby.

The correct rule as to demurrers to evidence, is laid down in Tidd's Practice of B. R. Lon. ed. 582, 583. Irish ed. 315, 316. The reason for obliging the party offering evidence to join in demurrer, does not apply to evidence of circumstances, or loose and indeterminate parol evidence. In Gibson and Johnson v. Hunter, which was a demurrer to evidence carried by writ of error to the house of lords, Lord Chief Justice Eyre, delivered the unanimous opinion of the judges, that it is the province of the judge to decide, whether the evidence offered conduces to the proof of the fact to be ascertained; but the question, how far it conduces to prove the fact, belongs to the jury exclusively, to decide upon. 2 H. Bla. 205. And after examining the cases of Middletown v. Baker in Cro. Eliz. 751, and 5 Co. 104, and Wright v. Pinnar in Aleyn 18, and Style 22, 34, he concludes, that on a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the evidence offered conduces to prove. *Ib.* 209. A demurrer to evidence admits facts, which may be proved by presumptions, and probabilities. Bull. 318. Every inference with the jury may draw from the evidence, is considered as admitted by the demurrer. It is like a special verdict. The jury alone can judge of the truth of facts, and the party cannot by a demurrer to evidence, or any other means, take that province from them, and draw such questions *ad aliud examen*. Doug. 127. 183. The party on a demurrer to evidence, cannot take advantage of any objection to the pleadings. *Ib.* 222.

Arguments for the plaintiff. The court are indebted for the present motion and debate, to the importation of 2 Hen. Blackstone's Reports into this country, since the first argument on the relative merits of the titles, on the 26th December 1797. The

case of *Gibson and Johnson v. Hunter* certainly carries the law of demurrers to evidence beyond what were formerly the general received ideas ; because all the forms of demurrers in such cases to be found in the books, merely state the evidence. It will rest with the court to decide, whether the authority shall be adopted in this state, to its fullest extent. If it is so adopted, we contend, that the adverse counsel ought to have expressed their conclusions at the time of the trial. According to the grounds taken by Eyre C. J. in 1 H. Bla. 208, the whole operation of conducting a demurrer to evidence, is under the direction and control of the judge before whom the trial is had. It is obvious, that if this was not the case, there could be no demurrer to evidence where there was parol testimony, with any rational hopes of success ; because the counsel who adduced the testimony might, affect to infer the most inconsequential and unwarrantable matters therefrom, if the court would not interpose. There is no disguise, when we admit, that the same fears which operate on the defendant's counsel as to the court's decision of the law on the fact stated, alarm us as to the prejudices of a Northumberland county jury, prevailing a determination of the law and fact blended together.

The facts here are not proved by presumptions or probabilities. The evidence is positive clear and explicit, not loose and indeterminate. Parol evidence is sometimes certain, and no more admits of any variance than a matter in writing, which is the reason given in Co. El. 751. and 2 H. Bla. 206, why a party is obliged to join in demurrer, when the evidence which he offered is in writing.

In *Sexton lessee of Freeman v. Boyle*, Vern. and Scriv. 402, in the Exchequer Chamber of Ireland, the doctrine of demurrers to evidence seems to have received a full discussion, and the law thereon seems to be fully settled. It is in exact conformity to the cases already cited from Douglass. In the language of Carleton, C. J. of C. B. a demurrer to evidence admits not only those facts which are directly sworn to and stated on the record, but all conclusions of fact to which the evidence is admissible, and to which it is properly relevant and applicable. *Ib.* 454. All the judges of the court of Exchequer agreed to the same doctrine, though baron Hamilton was opposed to overruling the demurrer. *Ib.* 409. The Chief Baron Yelverton said, a difficulty had occurred to him during the argument. He had considered, that when a fact is attempted to be proved by probability and presumption, and there is a demurrer to evidence, the party offering the evidence ought to call on the other to admit it, before he joins in the demurrer ; but he had yielded to the opinion of his brethren, and had been helped out of the difficulty by the definition of a demurrer to evidence, in

Dougl. 114. Every fact which the defendant's counsel asked for at the trial, was admitted; the truth of all the facts sworn to, and all conclusions to which the evidence is properly relevant and admissible, are also admitted. Neither the field notes of Scull, nor the minutes of the Board of Officers are capable of a variance; they are in writing; and the defendant's counsel have admitted, that the tender of the money and taking possession of the land are precisely stated as facts on the record. The case of *Clark v. Russel* came before the Supreme Court of the United States, on a bill of exceptions. The judgment of the Circuit Court was reversed, because the charge of the judge of the Circuit Court asserted, that the letters which were relied on as the written agreement, might be explained by parol testimony. It was expressed as a general rule, without any qualifications or restrictions, and might have misled the jury.

The court continued the matter under advisement, and afterwards in September term, 1801, Shippen, C. J. delivered the opinion of himself, and Smith, J. as follows:

The difference between a cause coming before the court on a special verdict, and a demurrer to evidence, is that in the former case, the facts must be distinctly found by the jury; but on a demurrer, the evidence only comes up: yet if the evidence be by parol, and any doubts arise as to the effect of the evidence, it shall be considered, that the party demurring had confessed all the facts, which such evidence tended to prove, or which the jury might fairly infer from the facts, in favor of the party offering the evidence. It is true, that at the trial the party offering the evidence, may insist that the party demurring should confess upon the record the existence of the several facts, before he can be obliged to join in demurrer; yet if that be not done, and there be a joinder in demurrer, the case comes before the court above, upon the evidence only; and that court will consider every thing as admitted, which the judge at *Nisi Prius* would have done, in order to compel a joinder in demurrer. The difference in the two modes is only matter of form; as the court above can as well judge, what ought to be considered as admitted by the demurrer, as the judge below, and will regulate their judgment accordingly. And therefore the motion for a *venire facias de novo* is denied.

At the importunity of the defendant's counsel, the court agreed to hear another argument upon the merits of the titles. In the mean while, the book of minutes of the Board of Officers, which formed a part of the record, was lost; this occasioned considerable delay;

but it was afterwards agreed, that the loss should be supplied by the notes taken by the court and counsel, and the argument came on during the present March term, 1804.

Arguments for the defendants as tenants of ensign Morrow, must be considered in the same situation as if captain Jacob Kern had been the lessor of the plaintiff. The adverse possession of the land, is held to be notice to a purchaser, who buys the premises, without personal knowledge of a trust. 2 Bla. Com. 337. It was a matter of notoriety; and whatever is sufficient to put the party on an inquiry, is good notice in equity. 1 Atky. 490. Ambl. 813. 2 Fonbla. 155.

It appears by the evidence disclosed on the record, that the officers of the 1st and 2d battalions of the Pennsylvania regiment, meditated an application for lands in 1764, previous to the Indian purchase at Fort Stanwix, and subscribed certain sums for that purpose. Their services during the war were the alleged grounds of merit; and in January 1769, the governor having signified his assent to their request, his terms were acceded to.

On the 8d February 1769, a grant was made to them by the Board of Property, in nature of a special warrant, of 24,000 acres, to be taken up in bodies of 8000 acres each, to be seated and divided amongst them, according to their agreement among themselves, with this single exception, that Colonel Clayton should have no share thereof. He probably had given some offence to the government. But the name of ensign Morrow is found in the list of appliers, and he was included in the proprietary concessions. He is afterwards recognized as one of the parties entitled by his brother officers.

No conditions were annexed to the terms of the original contract, except seating of the land and payment of the purchase money. In every other particular it was complete and absolute, and did not depend on will or pleasure. Though the grant was general, it operated as to the three bodies of lands when surveyed, to make all who had joined in the measure, and were not excluded, tenants in common of the whole 24,000 acres, according to the proportions originally agreed upon, though the particular spots could not be defined. The division and allotment of the several tracts were to be made by the officers in a fair and equal manner; but no power of excluding any individual was ever vested in them. This is analogous to the devise of lands to a number of persons, to be divided between them by A. and B., according to certain settled proportions; it is clear, that in such a case, A. and B. could not, by their acts, divest the interests of any of the objects of the testator's bounty.

Previous to the meeting of the officers and surveyors at Harris's Ferry on the 16th May 1769, the lands had been surveyed in three bodies, in pursuance of the original grant. It cannot be denied, that at this time, the interest of ensign Morrow in his portion of the lands, as a tenant in common with his brother officers, became absolutely vested in him, and he could only be divested of it by some legal act. To the governor was reserved no right of revocation of his grant. The letter wrote by Mr. Secretary Tilghman, under his authority was a mere nullity. To the officers of the two battalions, belonged no right of exclusion. If it turned on that there was a deficiency of 419 acres of the lands directed to be surveyed, it should have been borne by all the parties interested, in proportion to their several shares. But it is repugnant to every principle of justice, that one officer should be enriched at the expense of another. Property and crime are matters distinct in their nature. A man, against whom a criminal charge is whispered, does not forfeit thereby even an inchoate right. But if ensign Morrow had been convicted of the supposed rescue, he would not have forfeited his vested absolute right in the lands in question. The governor's direction was, that it should be excluded from his share, until his innocence should be ascertained. The officers gratified the governor by assenting to Morrow's share remaining in suspense, until he cleared himself of the charge; but his lots were drawn as well as the rest; and it appears by the evidence, that he obtained 216 acres of the larger survey made on the waters of Bald Eagle. After the alleged offence, the Board of Officers received 16s., which was paid on his behalf, as his quota of expences which had accrued; and the survey of the lands in question is marked on the field notes of William Scull, as having been really made for him. These things would not have happened, if the officers had credited the charge and really meant to exclude Morrow at the time. His exclusion would have been absolute; his lots would not be drawn, nor any money have been received on his behalf; the survey of these lands would not have been made for him, nor, would he have been let into a share of the Bald Eagle lands. In fact, it was not until after the discovery of the deficiency of the 419 acres, that any serious injustice was meditated against Morrow by his brother officers. On the 14th November 1772, the land before allotted to him was assigned to captain Kern.

Even admitting that the governor once thought unfavorably of ensign Morrow, and on that account would unreasonably refuse to ratify his original conceptions, and also adopting the preposterous position, that he retained some kind of control over his grant, and might withhold a patent in his favor, we

have strong grounds to conclude that he changed his sentiments. Morrow could not demonstrate his innocence without a trial; and it was not to be expected that he would originate an indictment against himself for the supposed rescue. It does not appear that the government instituted any prosecution against him, that any indictment was found, or that he absented himself, and proceedings of outlawry were carried on against him. He was not called upon by proclamation of the governor to surrender himself to justice. This might have been done, though the forfeiture could not be thereby increased. From these circumstances united, and the acts of the other officers recognizing his right, the jury might reasonably infer, that the opinion of the administration as to the guilt of Morrow, had undergone a thorough change. The evidence conduced to prove it; and it is within the principle of *Gibson and Johnson v. Hunter*, which was adopted by this court in their decision on the motion for a *venire facias de novo*, made in September term 1801. The demurrer to evidence is a bold measure, and puts every thing to risk.

It is confidently apprehended that no strained construction has been made of the evidence, nor any unwarrantable conclusions deduced therefrom; that ensign Morrow became vested with a legal right to the premises in question, under the grant, allotment and survey, which he has never forfeited; that he has made a settlement on the lands, and tendered all monies due for his patent; and that he has a good title to the tract, whereof the plaintiff seeks the possession.

Arguments for the plaintiff. It cannot be denied that the lessors of the plaintiff have the complete legal paper title, and that the decision should be in their favor, unless an exclusive legal or equitable right to the tract of land, patented to captain Jacob Kern, can be shown on the part of the defendants.

The meritorious services of the officers have been frequently sounded in our ears; but to whom were they rendered? Not to the late proprietaries. They were provincial troops, raised and paid by the then province. On the ground of right the officers had no pretensions. They well knew this, and therefore applied for liberty to take up a large body of land by special license, before the office was opened, by way of favor and indulgence. The origin of their claim was neither warrant nor location, but a species of order different from the common mode of granting lands. Hence it would seem, that the control over this order remained in the governor and Board of Property, until the purchase money was paid and the settlements effected. At any rate, the lands were, "to

be divided amongst them, and seated according to their agreement among themselves, and the concessions of the proprietaries to their petition." Sundry future acts are requisite in order to a confirmation ; and with respect to ensign Morrow, these contingencies never happened. The confirmation of the proprietaries could not take place until the allotments were made by agreement among themselves. There was an express exception by the proprietaries against Morrow ; before their private lotteries were drawn, and before any appropriations were made, until he would submit to a trial, and clear himself of an atrocious crime laid to his charge. Colonel Clayton had given some offence to the government, and was refused any participation in the indulgence. Ensign Morrow had been charged with a breach of the laws, and had thereby given offence to every sober mind, and before any appropriation was made to him, notice was given that he was to receive no favors. Every after act in his behalf was repugnant to the will of the lords of the fee. Widely different perhaps might the case have been, if before such exception, the allotment had been fairly made, and the party was ready to comply with the terms. This special order was grounded on no other consideration than the good will of the proprietaries. No money was paid upon it. If confirmed it was valid, but its execution could not be compelled. The assertion that the jury might have concluded from the circumstances relied on, that the governor had changed his mind as to the guilt of Morrow, is wholly unfounded. It appears from the book of minutes, that the governor adhered to his resolution to exclude Morrow on the 14th November 1772. The demurrer only admits facts which the jury might fairly deduce from the evidence ; and here positive evidence negatives that inference.

On the 16th May 1769, secretary Tilghman's letter was read to the officers at Harris's Ferry, before the lottery was drawn. It was not to be expected from them, that they should oppose the wishes of the government, and induce a risk of their own title. They unanimously resolved, that Morrow should have no share of the lands in question, until he cleared himself of the offence ; but they allowed him a conditional chance in the lottery, and his property in the allotment to be made to him was declared to remain in suspense. He never submitted to a trial ; the governor adhered to his first determination, and Morrow was afterwards entirely excluded, and the land in dispute was allotted to captain Kern, by agreement of all the officers. By their fundamental articles, the board of officers were appointed their general agents in the division of the lands, and each individual agreed to be bound by their acts.

Kern unquestionably had an equal right to his proportion of

the lands with the other officers. If he had equal equity with Morrow, his legal right out to prevail. It is of no moment as to the question before the court, whether the officers acted right or wrong in their division, but whether an allotment of this land was made to Morrow absolutely, to the prejudice of Kern. If no such allotment has been made, the former has only an undivided interest in the 24,000 acres, and not a right to any specified portion of the lands, even considering the original concessions as irrevocable. The warrant of acceptance, as well as the book of minutes, shows that this land was allotted to Kern, and that he had paid the consideration money is very clear. The Board of Property therefore could only grant the patent to Kern, to whom the allotment was made.

Whether Morrow has a title to the 216 acres on the Bald Eagle, may come in discussion at a future day: but it is apprehended, that the tract marked in his name in the general survey, was drawn conditionally and to remain in suspense, equally with the tract now in dispute, though marked in the field notes of William Scull as surveyed for him; and it is clear, that the deputy surveyors could make no appropriation of the surveys, unless by order of the officers in general, or the Board of Officers.

Another consideration appears to us to have weight. The purchase money under the original terms, was to be paid on the different tracts within fifteen months; and whoever did not pay their purchase money, forfeited their shares of the lands surveyed, which might be granted over to others. In this case, no money was tendered to the Receiver General, nor patent demanded from the secretary of the land office. The proof is express and direct, that Reuben Haines, in February or March 1774, as agent and on behalf of ensign Morrow, tendered to the Board of Officers in Philadelphia the money for patenting the land in dispute, which was refused by the officers. This tender is wholly inoperative, having been made to the wrong persons, and above fifteen months after the lands were allotted finally to Captain Kern.

Shippen, C. J. The court are called upon to try this cause on the demurrer to evidence. I will give my sentiments on the title in a few words: I think of it now, as I thought when the event happened.

Governor John Penn, for whom I had a high respect, was greatly irritated at ensign Morrow, who was strongly suspected of aiding the rescue of the persons charged with murdering the friendly Indians on Middle creek. But I thought him wrong in the present matter. The Board of Property had granted a favor to the offi-

cers, including Morrow, in granting them a special license to take up lands, in three large bodies before the office opened. A contract was formed thereby and entered in the books of the land office, which the proprietaries could not rescind. Though the officers had the first choice, they were bound to pay the usual price for the lands; and after the concessions were once made, it was too late to retract the license. The special circumstances under which the grant was made, do not seem to create any distinction between it and a location or warrant, except that on the latter the money would be paid down; and it is clear to me, that the officers at Harris's Ferry had no right to impose the terms of Morrow's clearing himself from the charge, before he should be admitted to a share. It is admitted on all hands that he paid 16s., his quota of expenses, and this tract was drawn as his lot in the lottery. A difficulty has been stated, that he has not paid his purchase money, nor tendered it to the proper persons within the proper time: but this in my idea, does not invalidate the first grant; and on the whole, I think the defendants' title the best.

Smith, J. I agree to the opinion delivered, though with great diffidence. The difficulty which strikes me, is, that under the terms of purchase, whoever failed in complying therewith, forfeited his share, and the lands might then be granted to other. This seems to distinguish it from the common modes of granting lands by warrant or location, in which there are no such clauses. It is like a legacy given on a condition in restraint of marriage, with a devise over: such subsequent conditions will have their full effect, and cannot be got over. 4 Burr. 2055.

Brackenridge, J. On the merits of the case, I clearly agree the title to be in the defendants.

Demurrer overruled, and judgment for the defendants.

AT A CIRCUIT COURT AT EASTON, JUNE, 1804.

CORAM, YEATES AND SMITH, JUSTICES.

RESPUBLICA *against* JESSE CLEAVER, JOHN CLEMENS, ADAM DESHLER, and PHILIP MESSINGER.

Qr. Whether stealing one promissory note is not within the act of assembly of 5th April 1790 § 5?

It is discretionary with the court, whether they will quash any indictment, but they will not do it, unless in a clear case.

They will not quash an indictment for larceny, in stealing one promissory note.

INDICTMENT for larceny, in stealing a promissory note from Philip Messinger to Jesse Cleaver, (two of the defendants) for 175., and assigned to Henry Abel.

The defendants' counsel, before any pleas being entered, moved in the sessions, to quash the indictment; and the opinion of Mr. President Rush was in favor of the motion, but the associate judges thought differently. The prosecutor for the commonwealth having removed the indictment into the Circuit Court, the motion to quash it was again resumed.

It was insisted, that nothing could be more clear than that choses in action, were not subjects of larceny, at common law, not having any intrinsic value in themselves. 1 Haw. c. 33, § 22. The law in England in this particular is altered by stat. 2 Geo. 2, c. 25, § 3. 5 Ruff. Stat. 699. This act was passed in 1792.

The act "for amending the penal laws of this state," passed on the 15th September 1786, § 7, (Loose Acts, 131.) introduced a provision of a similar nature, into our criminal code. But this being repealed by the act "to reform the penal laws of this state," passed on the 5th April 1790, (2 St. Laws, 804,) it was enacted by the 5th section thereof, "that robbery or larceny of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates granted by, or under the authority of this commonwealth, or of all or any of the United States of America, shall be punished in the same manner as robbery or larceny of any goods or chattels." The words of the section, except as to public certificates, are copied from the law of September 1786, and the particular choses in action, in which robbery or larceny may be committed, are all enumerated in the plural number.

No rule of law is better established, than that penal statutes shall be construed strictly. They shall not be carried beyond their letter. The statute of 1 Edw. 6, c. 12, (2 Ruff. Stat. 395,)

took away clergy from those convicted of stealing horses: but the judges held, that this did not extend to him, that stole but one horse. 1 Bla. Com. 88. This defect was remedied by stat. 2 and 3 Edw. 6, c. 33, (2 Ruff. Stat. 426,) in the preamble whereof, it is stated, that "it had been ambiguous and doubtful upon the words of the former act, whether a person found guilty of stealing one horse, gelding, or mare, should be admitted to his clergy," &c.

This is a strong legislative exposition of the doctrine we contend for. And it is settled law, that the party indicted, must be brought within the letter of the statute. 2 H. H. P. C. 344.

Hassel's case in Leach Cro. Cas. 1, will be objected to us. There it was held, that it was felony to steal one single bank note, under stat. 2 Geo. 2 c. 25, § 3, though the several species of property are described therein in the plural number. The grounds of the adjudication are not expressed in the report, though the arguments on both sides are detailed. Sir Philip Yorke, attorney general, contended for the extension of the statute to a single bank note, on account of the special wording of it. It enacts, that "whoever shall steal any bank notes, &c. shall be guilty of felony, &c., notwithstanding any of these particulars, may be termed in law a chose in action." This showed, that the legislature intended, that the stealing of a chose in action, which one single bank note is, should be made felony. A late ingenious editor of the crown law gives the same reason. 2 East's Cro. Law, 598. The decision then must have been grounded on the word any, which according to Johnson's dictionary, is the opposite of none.

Such an argument cannot be collected from the expressions in the act under consideration. The 5th section contains two distinct members, the one describing the offence, the other enacting the punishment; and this can have no other effect on the preceding part of the sentence, than if a punishment of such offences, different from common robbery or larceny, had been inflicted. The plural description holds throughout; and no instance can be shown where an offence thus described in a statute, has been punished in the singular, without other words showing the plain intention of the legislature. By the statute of 22 and 23 Car. 2, c. 7, it is made felony to burn any ricks or stacks of corn, &c. in the night time; the burning of one rick would be felony because of the word any, which is the converse of none. By the statute of 10 Geo. 3, c. 18, if any person shall steal any dog or dogs, of any kind or sort whatsoever, he shall upon conviction, forfeit any sum not exceeding 30*l.* nor less than 20*l.*, or be committed to the common goal, &c. Notwithstanding the generality of these words, it is doubtful whether upon

this act, it is penal to steal a bitch. 1 Burn's Just. 497, (14th edit.) The learned author asserts this not to be a mere cavil, and assigns this plain reason. What a man has a right to, (as his life, liberty or estate,) by a clear and undoubted law, shall not be taken from him by a law less clear and certain.

So by the stat. of 10 and 11 Wil. 3, c. 23, stealing any goods, wares, or merchandizes by night or by day, in any shop, warehouse, coach-house or stable, to the value of 5s., is punishable with death. And yet it has been held, that the word ware-house, in the statute, is meant not a mere repository for goods, but such places where traders keep their goods for sale, in the nature of shops, and whither customers go to view them. Fost. 77. And money is not included under the words any goods wares or merchandizes, though part of it consisted in Portugal money, not made current by proclamation, but commonly current. Fost. 79.

The criminal law of England, is peculiarly benevolent. A slight variance in point of description of an article stolen, will defeat an indictment. Thus, where one was indicted for stealing a cow, and it appeared on evidence to have been a heifer, which had no calf, the party was acquitted; because she was not such as was described in the indictment. 2 East Cro. Law. 615.

E contra, it was admitted by the counsel for the state, to be generally true, that penal statutes should be construed strictly, yet even in the construction of these, the intention of the legislators ought to be regarded. 4 Bac Ab. 651. And many cases of this kind are to be found in the books. 3 Co. 7. Plowd. 86. Cro. Car 71. 11 Co. 34, 35. It is obvious that all statutes should be construed reasonably, according to the plain rules of common sense.

What can be more correct, than the expressions of the attorney General in Hassel's case? "It would be a most unreasonable construction to say, that the legislature intended to make it felony to steal two notes of 5*l.* each, and yet that it should not be felony to steal one note of 10,000*l.*" The application of the remark to the law under consideration is very familiar.

Lord Hale was of opinion, that the scruple of the judges did not merely depend upon the words of the statute of 1 Edw. 6. c. 12, being in the plural number, but on the particular penning of 37 Hen. 8. c. 8, in the singular number, the words being "if any man do steal any horse, mare, or filly," &c. The stat. of 1 Edw. 6. c. 12, varying the number, and at the same time repealing all other exclusions of clergy introduced since the beginning of Hen. 8, it raised

a doubt whether it were not intended to restore clergy, where only one horse was stolen. He asserts, that no doubt had ever occurred respecting former statutes, in the plural number; as for instance, it was enacted by 32 Hen. 8. c. 1, that no person convicted of burning any dwelling houses, should be admitted to clergy. 2 H. H. P. C. 365.

The reasons of the judgment in Hassel's case are not given: they may have been founded on a reasonable construction of the statute of 2 Geo. 2. c. 25, as contended for by the counsel for the crown.

Much stress has been laid on the word any, in decyphering the true meaning of that act, and of the 22 and 23 Car. 2. c. 7. But that word is incorporated in the 7th section of the penal law, which declares that robbery or larceny of obligations, promissory notes, &c. shall "be punished in the same manner as robbery or larceny of any goods or chattels." It is of no moment in what member of the sentence the word is placed; its effect must be correspondent to the design of the law makers, if it be clearly expressed; it must be so read, as to make the whole passage consistent. It is declared, that the punishment for stealing promissory notes, shall be the same as of any goods and chattels. A certain penalty is to be inflicted for the stealing of any specific article, as a watch, a piece of gold, &c., and it would be a plain violation of the words as well as intention of the act to assert, that the stealing of one note would not be subject to the same penalty. The latter clause of the section meets the remark of East, in the passage cited from his 2d vol. of the crown law 598, that the stealing of one bank note is within the statute of 2 Geo. 2. c. 25, "particularly on account of the words which follow, notwithstanding any of these particulars may be termed in law a chose in action." The closing expressions in each of the sections, renders the intention of the legislature clear and apparent.

We may justly plume ourselves in the reflection, that the criminal code of this state is singularly mild, and that punishments are duly proportioned to offences. But an overweening refinement, studious of verbal niceties and critical difficulties, and tending to impair the energy of the laws, will not meet with favour in our courts of justice. Most of the authorities cited from the English books, respect capital cases, in which the judges have been uniformly tender and humane: but they will not depart from the plain elements of common sense. It is provided by the statute of 9 Geo. 1. c. 22, that if any person shall unlawfully and maliciously kill, maim, or wound, any cattle, he shall be guilty of felony, without the benefit of clergy. A mare and colt have been held to be

cattle, within this statute, which is commonly called the Black Act. 2 Bla. Rep. 721. Horse stealing extends to a foal or filly. 2 East Cro. Law 615. Vide ib. 609, 620.

By the court. We feel ourselves bound to construe every law, according to the true intention of the legislature, to be collected from the words of the act itself; and are disposed to construe penal laws strictly, and not extend them beyond their letter. On principles of common safety to the community, as well as individuals, we must be governed by former precedents, unless they evidently clash with our perceptions of right and wrong. Bonds, bills, notes, and other securities which concern mere choses in action, were not subjects of larceny at common law, being of no intrinsic value, and not importing any property in possession of the person from whom they were taken.

The law in this particular is changed by the provisions of the 5th section of the penal law, enacted on the 5th April 1790. The descriptive parts of this offence are larceny of promissory notes for the payment of money in the plural number. The first adjective any, clearly relates to certificates of any, of the United States. The subsequent words are, "shall be punished in the same manner, as larceny of any goods or chattels." It has been contended, that the second member of the sentence refers merely to the punishment, and cannot amplify the preceding descriptive words. But we are not at liberty to reject the term any; we are bound to give it a reasonable construction. When the law prescribes the punishment to be in the same manner as larceny of any goods or chattels, is it not necessarily implied, that as larceny of any individual specific article is punishable, so is larceny of a single note? May it not be said correctly, and without violence to the words, that as the stealing of one horse, cow, or silver spoon is larceny, so also is the stealing of one bond, or promissory note, and punishable in like manner?

We would be equally cautious of not relaxing wholesome positive laws, calculated for the good of society and of carrying penal laws beyond their letter; and whatever our private sentiments may be of the intention of the legislature, we must be governed by their expressions contained in the law itself.

To make the most of the objection, it is but dubious. It is in the discretion of the court, whether they will quash any indictment whatever, upon motion. 1 Wils. 325. S. C. Sayer 27. The defendants may demur to it, if so advised; where the crime is of an enormous or public nature, it is usual to put the parties accused to their plea or demurrer. 2 Hawk. c. 25. § 146. Vid. Say. 158. 161

2 Burr. 1127. 4 Burr. 2116. It does not comport with our ideas of justice or sound discretion to interpose in the summary manner prayed for in the present instance. Without anticipating the opinions we may hereafter form on the legal question, should it become necessary, it is sufficient for us to say, that this is not so clear a case, as would warrant us in quashing the indictment.

We therefore deny the motion. Let the defendants either demur or plead: should the trials proceed and verdicts be found against them, we can keep the matter under advisement, until we can consult our brothers in bank, and form a satisfactory opinion on the subject. The code of criminal justice should remain fixed and certain on the most solid grounds.

The defendant were arraigned and pleaded *non cul.*

On the trial it appeared, that the paper charged to be stolen, was a single bill under seal, and the defendants were acquitted by reason of the variance, without any address to the jury.

But the court on motion of the prosecutor, obliged the defendants to enter into recognizances with sufficient sureties, to appear at the next Court of Quarter sessions of the peace, to answer a new indictment.

Messrs. J. Ross and Evans *pro repub.*

Messrs. Sitgreaves and Hopkins, *pro def.*

WILLIAM BARNET and JOHN BARNET adm'rs of HENRY BARNET
appellants *against* JACOB YOHE, appellee.

When a judgment had been obtained by a father-in-law, against his son-in-law, on a bond, and all the visible estate of the latter has been sold by the sheriff, leaving a considerable balance due, and the former has died intestate, and his lands have been valued in the Orphan's Court, the court will direct, that the distributive share of the latter, in right of his wife, of the valuation, be credited on the judgment obtained against him.

APPEAL from a decree of the Orphan's Court of Northampton county, on the petition of the appellants, filed on the 20th March 1804.

The petition stated, that Jacob Yohe, the appellee, intermarried with Susannah, one of the daughters of the intestate, and was indebted to the intestate in his life-time by bond dated 20th August 1799, conditioned for the payment of \$1084 and 50 cents, with interest.

That judgment was rendered against the said Jacob as of August term 1790, in Northampton county, on the said bond, and divers executions issued thereon both in the life of the intestate

and since, by virtue whereof his real and personal estate had been sold for satisfaction of the said judgment, amounting, exclusive of costs, to the net sum of \$132 and 73 cents; and that the residue of the said bond remains due.

That a writ has issued out of the Orphan's Court for the partition or valuation of the real estate of the said Henry Barnet, and by an inquisition, the real estate has been divided into four parts, and three of the said parts were awarded to the petitioners, William Barnet and John Barnet, and to John Yohe and Susannah Dawes, children of Mary Yohe, a deceased daughter of the said intestate, by her husband Adam Yohe, also deceased, one fourth part to each respectively.

That the said William Barnet, John Barnet, John Yohe, and Susannah Dawes, are bound to secure the other legal representatives of the said Henry Barnet, by bond and recognizance, their several and respective shares of the valuations, according to the rates of their respective rights; and that the said Jacob Yohe is entitled, in right of his wife Susannah, to one equal fifth part of the several valuations.

That the petitioners do not know or believe, that the said Jacob Yohe is seized or possessed of any property, real or personal, to satisfy the residue of the aforesaid judgment, other than his interest in the said valuation, in right of his said wife.

And the petitioners prayed, that the several sums of money which accrued in virtue of the said inquisition and valuations to the said Jacob Yohe, in right of his said wife, as his purpart and share of the respective valuations, may be made due and payable to the petitioners, in satisfaction of the residue of the aforesaid judgment; and that the bonds and other securities to be given by the said William Barnet, John Barnet, John Yohe, and Susannah Dawes respectively, the one fifth part of the valuation accruing to the said Jacob Yohe, may be made payable to the petitioners, or that the sums may be otherwise secured to the petitioners, in such manner as the court might direct, for the benefit of the estate of the said intestate, for and towards satisfaction of the residue due and unpaid on the said judgment.

The petitioners made affidavit of the truth of the facts contained in the petition; and also made proof of the service of notice on the said Jacob Yohe, that the Orphan's Court would be moved for the purposes contained in the petition.

The Orphan's Court on argument, adjudged that the prayer of the petitioners could not be granted, from which adjudication the petitioners appealed, and gave security to prosecute the appeal with effect.

Mr John Ewing for the appellee. Two exceptions were taken in

the Orphan's Court to the prayer of the appellants. 1. That the court had no jurisdiction respecting the subject matter. 2. Even admitting such jurisdiction, it ought not to execute it.

In vain we search the act of assembly, for authorizing the Orphan's Court to exercise jurisdiction in matters of this nature. If we examine the act "establishing Orphans Courts," passed in 1713, (1 Dall. St. Laws, 98) or the act directing the descent of intestates real estates, and distribution of their personal estates, passed on the 19th April 1794, (3 St. Laws 521) or the supplement thereto, (4 St. Laws 155) we find no such powers conferred on them. The appellee is neither a guardian, trustee, tutor, executor, or administrator, or otherwise accountable for any real or personal estate of orphans; nor had the Orphan's Court any authority to award process, to cause him to come before them. Their jurisdiction is limited, and their powers are defined.

But allowing them jurisdiction, it ought not to be exercised in the present instance—Because,

1. This is in fact the case of administrators praying a set-off. The defalcation act of 1705 (1 St. Laws 65) is confined to persons sued in a court of common law. There can be no set-off but of mutual debts in the same right. The parties in the Common Pleas and in the Orphan's Court are different. In the former they are administrators; but in the latter, they petition as heirs of the intestate to be allowed a short cut to the payment of their proportion of the appellee's debt. But under the act of 19th April 1794, § 22, whoever takes the lands of the intestate at a valuation, must pay the other children their respective purparts.

2. The petitioners had a remedy at law complete and adequate before the valuation, as to the life estate of the appellee in his wife's share of the lands. Their remedy against his person has been taken away, by his discharge, under the insolvent laws, subsequent to the judgment. This case must be determined on general principles. If the bond to the intestate had been disputed, no mode of investigation of the controversy would be open to the Orphan's Court; whereas the Common Pleas might try the fact by a jury, and afterwards issue execution.

3. The remedy here had been discharged by the act of the parties who are petitioners, and who applied for the valuation; and equity would not relieve in such a case. If a party has lost his right by a legal bar, he can have no remedy in chancery. 2 Atky. 240. In cases proper for law, a man must defend himself by legal pleading; and an injunction was devised in a hard case where an executor pleaded an improper plea. 1 Vern. 119. So, where an administrator,

a defendant at law, pleaded a false plea, by mistake of his attorney. 2 Vern. 325.

4. The appellants have no equity superior to the other creditors to be paid their demand, preferably to such creditors. There can be no difference as to who makes the application to the Orphans' Court, whether he is the administrator of the intestate, or a general creditor of the appellee. The same equity will extend to all the creditors, in proportion to their debts.

If notwithstanding what has been urged, it shall be thought, that the Orphans' Court had jurisdiction in the premises, it is submitted to the court, whether that jurisdiction ought not to be exercised in such a way, as to secure the payment of the principal of the wife's distributive share of the valuation, to her or her issue, after the death of the appellee; conformably to the equity decisions, that a settlement shall be made on the wife, before chancery will lend its aid to enforce the payment of a portion or legacy to the feme?

Mr. Sitgreaves for the appellants. While the adverse counsel has denied to the Orphans' Court the very means of doing common justice to the children of a family, he has in the close of his address, affected to confer a jurisdiction on them, which has never been exercised by any court in Pennsylvania. That courts of equity in England, (1 Fonbla. 88,) will not lend their aid to the husband, to render his legal right available for the recovery of her fortune, unless he has made a proper settlement on the wife, or she consent in court to his receiving it, is readily admitted. Nay, that they have even granted an injunction to prevent the husband proceeding in the Spiritual Court, for the wife's portion arising out of personal estate, (*Ib.*) is also conceded. But it is sufficient to observe on this head, that our manners, as well as the powers of the two courts, materially differ; such adjudications would not improve the state of society amongst us, and in fact, have never been adopted in this state. By act of law, the real estate of the wife is converted into personalty, and the appellee is vested with the legal right to receive

The court will consider the case on its true merits. The bond is not disputed; *transivit in rem judicatam*. The executions and sales, are matters of record. So are the inquisition and valuation. Every fact is truly stated in the petition. If the appellee has any other property, which may be levied upon, it is competent to him to show it, and our object is answered. There are no creditors before the court, except the administrators of the intestate; none such resist their claim. It is insisted, that the facts disclosed, operate as a legal bar to the appellee's receiving his wife's distribu-

tive share of the valuation of the land ; and not that the provisions of the defalcation act apply. It is analogous to the plea of payment to a bond, with leave to give the special matters in evidence. What ought not to be paid, shall be considered as paid. He who asks equity, must do equity himself. So in courts of law, one judgment may be set off against another, though obtained in different courts. And it cannot be denied, that if this valuation had arose by writ of partition, in the Common Pleas, they would have interfered as to the distributive share, vested in the appellee. If a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied, in another action, at the suit of the defendant. Dougl. 219, (231) The case of Edgell v. Haywood and Dawe, in 3 Atky. 352, bears considerably on the question before the court. The marginal note is as follows: D. being indebted to C. by bond, in 200*l.*, the plaintiff, administratrix of C., brought an action against D. who pleaded the act for the relief of insolvent debtors, and that he was duly discharged; the plaintiff took judgment for the 200*l.*, and 5*l.* damages. M. by his will gave D. 1000*l.*, to be paid to him by his executor in a month after the testator's death; the plaintiff sued out a *fiery facias* on the judgment, and lodged it with the sheriff, and took a warrant to levy the debt out of the legacy, and brings her bill against the executor of M. to admit assets to so much of the legacy, as the plaintiff's debt amounts to, &c. Lord Chancellor Hardwicke held, that the plaintiff had pursued a proper remedy, and what shall be found due for principal, interest and costs, at law and in equity, ought to be satisfied out of what is due to D. on account of his legacy. The appellee here is indebted to the estate of the intestate a considerable sum, and yet demands a distributive share equal to the other children. To suppose that the Orphans' Court would exceed their jurisdiction in a case where manifest injustice would be done without their interposition, would be gross indeed! The decree was made in the Orphans' Court in the absence of the president.

By the court. All the parties interested in the question, are before us. There can be no dispute concerning facts, for they are matters of record.

The petition of the appellants is replete with equity. As to the appellee, the denial of the prayer of the petition must be repugnant to the feelings of every honest mind, and a supposed defect of power in the Orphans' Court, could only have occasioned their adjudication.

The point of jurisdiction then seems the only question, which calls for our decision. Under the old law of 1705, § 2, (1 Dall.

St. Laws, Append. 44,) the words of which, in this particular, are pursued by the law of 19th April 1794, § 1, (3 St. Laws, 522,) "the Orphans' Courts are to make just and equal distribution of what remaineth clear, after all debts and funeral and just expenses of every sort, first allowed and deducted, amongst the wife and children of the intestate," &c.

To assert that a son or son-in-law, should take a full share with the other children, while the former owe a just debt to their father or father-in-law, and not deducting the same out of their purparts, would fundamentally violate the rules of equity, honesty, and good conscience. Of such debts, the other children are entitled to a full and equal proportion. Otherwise, the consequence necessarily must be, that the estate is not justly and equally divided. Such debts due to the decedent, form a part of his estate, and swell the common stock.

The policy of the law has changed the realty into personalty, and the appellee by the valuation, is become entitled to receive his wife's distributive share absolutely as his own, if there existed no peculiar circumstances to bar him. But equality in the present instance is peculiar equity, and he is bound to do justice to the other branches of the family, while he demands his share of the estate.

The decree therefore of the Orphans' Court, must be reversed, and the prayer of the petitioners be granted, by deducting the distributive share of Jacob Yohe and Susannah his wife, from the sum due by him on the judgment, and that the giving credit therefor, shall be deemed full payment to him in right of his said wife; and that the judgment of this court be remitted to the Orphan's Court, to be carried into execution.

This decision was confirmed on an appeal to the Supreme Court, in March term 1808. 1 Binn. 358.

JOSEPH TAYLOR *against* JACOB MEEKLY.

A bond on *non est factum*, must generally be proved by the subscribing witnesses; but if they cannot be had, or are unable to prove the execution, collateral testimony is admissible.

A JUDGMENT was entered up against Daniel Meekly and Jacob Meekly, on a single bill, dated 14th March 1801, for 41*l.* 15*s.* 9*d.*, payable on the 1st September then next, in pursuance of a warrant to confess judgment.

The judgment, so far as it respected Daniel, remained in force, but was opened as it related to Jacob, who was the father of Daniel, on his affidavit, that he had not executed the instrument. The cause now came on to trial on the plea of *non est factum*.

The paper produced purported to be a joint bill, with several obliterations and additions to it. in a different ink. Thus, "I promise," would read "we promise;" "I bind me," would read "we bind us;" and "my hand and seal," would read "our hands and seals."

The hand-writing of two witnesses, "George Armstrong and William Freet," were subscribed to the bill, and the mark of Sally Meekly was added in a different ink.

She was the daughter of the defendant Jacob Meekly, and was since intermarried with one Plummer.

Upon being sworn, she deposed, that she had put her mark to the paper about three years ago, at the instance of her brother Daniel, and the plaintiff, Taylor, at her father's house near the town of Northampton. That her father was not then in the room, nor did she see him write his name, or seal and deliver the paper, or acknowledge the same as his deed. She was then 14½ years old, and that evening she told her father of her having put her mark to a paper, but he made no further inquiry. That her brother Daniel, and the plaintiff, were together at her father's for two or three days, but she knew nothing of their business, or what they were doing in the room when the paper was signed, where they continued for half an hour. That her brother Daniel had followed the business of keeping store at Greensburgh, in Westmoreland county, (distant above 250 miles from her father's house) and the plaintiff was a stranger to her before. That she knew no such person as George Armstrong or William Freet; nor when she put her mark to the paper were any such persons present. On her cross-examination, she declared she did not know what paper she had put her mark to, and that it was not read to her.

It was admitted that George Armstrong and William Freet had for several years past lived in Greensburgh, but they had not been subpoenaed, or appeared.

The plaintiff's counsel then offered to show by collateral testimony the admissions of the defendant to several witnesses, and also by two of his letters; that he had executed the bill as security for his son Daniel, who had sealed and delivered it before in Greensburgh; that he was desirous of keeping it a secret to keep peace with his other children; that he received from the plaintiff at the time of such his execution, a deed for certain lands which he had made over to his son, and which had been delivered to the plaintiff by way of security for goods sold to him; and that he greatly feared he would be sent to a prison, unless his son would raise the money to pay off the bill by a sale of his store goods.

The defendant's counsel excepted to this testimony, as a violation of a strong technical rule of evidence. The subscribing witnesses are alone competent to prove the execution of a written instrument, because they may know and be able to explain facts which passed at the time of execution. Vid. 2 Bos. and Pul. 85. 1 Dall. 209. 4 Burr. 2275. The rule cannot be dispensed with, unless it appear that the attendance of the subscribing witnesses cannot be procured. Dougl. 205 (216.) *Abbot v. Plumbe*. Where the witnesses cannot be got, it will suffice to prove their hand-writing and that of the obligor. *Ib.* 89 (93.) *Coghlan v. Williamson*. On the face of the instrument it would appear, that the three subscribing witnesses were present at the execution of it, and therefore they should have been procured, or their absence accounted for. It is admitted that Armstrong and Freet are in full life at Greensburgh; and if their personal attendance could not have been procured, their depositions might have been taken under a rule of court. No efforts having been made to procure their testimony, induces a presumption unfavorable to the plaintiff.

The plaintiff's counsel answered, that it would be to little purpose to have examined the two witnesses to a transaction of which they knew nothing. The bill was executed by the son in Westmoreland county, in March 1801, where Armstrong and Freet lived, but by the father in Northampton county, in June following, where his daughter resided with him. It is true, the attestation is drawn in an inaccurate manner, as if the three witnesses were present when the bill was sealed and delivered by both of the obligors. But the circumstances disprove the fact, thus collected from the appearance of the note; and the daughter swears, that no such persons as Armstrong and Freet were at her father's house when she witnessed the paper. She certainly attested something, but what it was she does not now recollect. She was young at the time, and must be supposed to lie under a strong bias to her father.

We are therefore at liberty to call other witnesses to prove the execution, as she denies it. 4 Burr. 2225. Peake's Evid. 61. Sarah Plummer, not having seen the deed executed, it is the same as if there was no witness at all; and in that case, the hand-writing may be proved by another witness; from which a presumption arises that it was sealed and delivered. Peake's Rep. 147. *Grellier v. Neale, et al.* Per Lord Kenyon. The case of *Lowe v. Jolliffe*, in 1 Bla. Rep. 365, is extremely strong. There three subscribing witnesses to the testator's will, and the two surviving witnesses to a codicil, and a dozen servants of the testator all swore, that he was utterly incapable of making a will; but

evidence of several of the nobility and principal gentry of the county of Worcester, was received in support of his sanity, and the will of the testator was fully and satisfactorily established. By Cowp. 204, it appears, that circumstances may amount to the delivery of a bond.

By the court. The obliterations and additions apparent on the bill in a different ink, strongly fortify the opinion, that it was executed at different times by the son, and the person whoever he was, that added the signature of the father. There would be great weight in the defendant's objection, if Sarah Plummer had not proved, that Armstrong and Freet were not present, when the second execution is supposed to have happened. Circumstanced as this case is, the subscribing witness being unable* to prove the execution of the single bill by the defendant, and there not being the slightest probability, that Armstrong or Freet could throw any light on the transaction, we are of opinion that collateral evidence may well be received.

The evidence was accordingly admitted ; and a mass of testimony, both written and parol, was produced, which established the instrument produced, to be the deed of the defendant, beyond all doubt.

The jury readily found a verdict for the plaintiff.

Mr. Hopkinson, *pro quer.*

Messrs. M. Biddle and J. Ross, *pro def.*

*Vide *Ley v. Ballard*. Guild. 1790. Espin. Dig. 258, (2d edit.) The law on this subject, seems to be accurately laid down by Lord Chief Justice Kenyon, in *Barnes v. Trompowsky*. 7 Term Rep. 266. See also *Cunliffe, et al. v. Septon, et al.* 2 East. 183.

SEPTEMBER TERM, 1804.

OORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENBRIDGE,
JUSTICES.

GEORGE STILES *against* DANIEL RICHARDSON.

Where a master, in order to procure the possession of a runaway slave, manumits him in consideration of his agreeing to serve him for four years, he shall be bound thereby, and shall not avail himself of the pretext, that the manumission was a sham.

CASE.—The facts appeared in evidence, as follow :

Robert Ward held two negroes in Maryland, as slaves for life, under a devise from their former master, to the wife of Ward. They ran away from him, and came into New Jersey. He fol-

lowed by them into that state, and there executed a bill of sale of them to Samuel Pennington. On the 3d May 1797, Pennington executed a deed of manumission to them both, in consideration of their engaging to serve him for four years; and Ward declared in their presence, that he had no further claim to them, and they should go home with him. The defendant claiming under Ward, on the 21st May 1798, sold one of the negroes, named Isaac, to the plaintiff, as a slave for life, in consideration of 75l. When the period of his four years services was expired, Isaac was liberated, and the plaintiff brought an action for money had and received; and cited 2 Burr. 1008, 9, 10, 12 1 Term. Rep. 732. Palm. 364.

The defendant contended, that the deed of manumission was *pia. fraud*, and contended by Ward and Pennington, to obtain the possession of the negroes, in a place where runaway slaves were harboured against the provisions of 2d section of the 4th article of the constitution of the United States; and that when the bill of sale was made by Ward to Pennington, they both expressed their object to be the procuring of the negroes from their lurking places. His counsel cited 1 Pow. Contra. 370-1, that the intent of a contract is to be taken into consideration, and the formal words cannot be carried beyond the meaning of the contracting parties.

Sed per cur. An honest debt may be lost by a trick to come at it, as by adding a seal to a note, one lost his security. 2 Vern. 162. The master was under no necessity of restoring to this fraud. It is clear from the evidence, that the laws of New Jersey, were open for obtaining the possession of the negroes. The consideration of the manumission, was the agreement of the negroes, to serve for four years; and Ward openly declared that he had no further claim to them. The defendant cannot avail himself of the fraudulent pretext, that the bill of sale to Pennington, and his consequent manumission were mere shams. The trick is too gross to receive the sanction of a court of justice. Credit must be given for the time that negro Isaac continued in the plaintiff's service, and he is entitled to a verdict for the residue of the consideration money and interest.

Verdict *pro quer.* for \$275 50 damages.

Messrs. Condry and Franklin, *pro quer.*

Mr. S. Levy, *pro def.*

REUBEN MITCHELL, plaintiff in error, *against* DAVID SMITH.

[The report of Mr. Binney not containing the able argument of Judge Smith, that argument is here applied-]

SMITH, J. By the statement in the record, it appears that the contract on which the plaintiff below (the defendant in error) founds his action, and which the defendant below (the plaintiff in error) contends is null and void, was entered into on the 11th March 1796 ; and that the single bill, on which the plaintiff below contends he ought to recover, was given for lands in Smithfield township, in Luzerne county, out of the seventeen townships, which lands had been granted to him by the committee of the Susquehannah company, agreeably to a resolve of the said company.

Or in other words, that the plaintiff below sold to the defendant below, lands within this commonwealth, as the consideration of the single bill aforesaid, to which lands he had no title or claim, but in opposition to its laws ; and he calls upon its courts to enforce his demand, founded on such opposition. If on the principles of law he is entitled to recover, the court is bound to assist him, and will assist him, be the consequence what it may ; but unless we are satisfied that he is entitled to such recovery on the established principles of law, we are compelled to assist his demand , for it is a maxim in our law, that a plaintiff must show that he stands on a fair ground, when he calls on a court of justice to administer relief to him. 6 Term Rep. 409. 3 Term Rep. 456. It must not appear from his own showing that he has infringed the laws of his country. It is a rule, that those who come into a court of justice must come with clean hands, and must disclose a transaction warranted by law. 3 Term Rep. 422.

To enable us to judge whether the plaintiff below stands on fair ground or not, we must examine and keep constantly in our view the act of assembly passed the 11th April 1795, just eleven months before this transaction. The two first sections have been already read, from 3 St. Laws 703.

1. I will first consider the transaction under this act, as if the act of 6th April 1802 (5 St. Laws 198) had not been made ; because the law knows of no contracts but what are good or bad, at the time of the contract made, and not to be the one or the other, according to a subsequent contingency. *Pur cur.* 10 Mod. 67. 2 Equ. Ab. 679. 2 Ves. 423. 1 Atky. 404. 2 Equ. Ab. 511. 1 Fonbl. 122.

The first section of the law of 1795, does not bear directly on the question before us ; but consequentially it does not apply, as afford-

ing a strong reason why the plaintiff below ought not to recover on this contract, as I shall show hereafter.

The cause was so ably and ingeniously argued on both sides, and the principle is so important, that I have deemed it incumbent on me to examine carefully the numerous authorities, which were cited on each side. By that examination, I am convinced that the counsel had taken great pains to search for and arrange the principal cases, which apply to each side of the question. Every thing which ingenuity could suggest, was said in favor of the original plaintiff's demand.

It is laid down by the counsel for the plaintiff below, and it is certainly sound and settled law, "that where a statute appoints a penalty for the doing of a thing, which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment." Cro. Jac. 674. 1 Show. 398. See all the cases in Leach's note.

"That where new created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a prohibitory particular clause specifying other particular remedies, there such particular remedy must be pursued; for otherwise the defendant would be liable to a double prosecution, one upon the general prohibition, and the other upon the particular specific remedy." 1 Burr. 544.

"If a new offence is created by statute, and a special jurisdiction out of the course of the common law, is prescribed, it must be followed, or all is a nullity." Cowp. 544, 650. Per Lord Mansfield,

Were this an action of debt brought against an offender against either section of the act for the penalty, these cases which were cited and argued from, and many others to the same point which might be cited, would clearly apply. So they would, were any attempt made to inflict either of those penalties in any other manner than that prescribed by the act; but I confess, I cannot see their application to the case before us which is simply, whether a party acting in violation of a law of the state, and being liable to the penalty inflicted by it, shall have the aid of this court, in carrying such act into execution, or not?

It was contended, that the court ought to enforce the demand of the original plaintiff, because the transaction was no offence at common law, but the act of assembly only imposes a penalty on it, but does not declare it void. This position was much relied on. I reply to it in the words of Ld. Chief Justice Holt, which have already been repeated from Carth. 252. 5 Vin. 507.

The ingenious counsel in support of the original plaintiff's demand, feeling the force of this opinion, as directly in point and conclusive

against his client, thinks he avoids its force, by saying that it is only a *dictum*. It is so, but it is a *dictum* of Lord Chief Justice Holt, and has never been contradicted to my knowledge. As applied to the case before us, it seems to me unanswerable.

Cases may occur in which the legislature may inflict a penalty, or in other words, lay a duty on contracts between individuals, of a nature affecting only themselves, and having no influence on the public welfare. Such contracts may be entered into without breach of moral or political duty; and if so, they ought to be enforced, if the party claiming the benefit of them pays the duty or penalty, or becomes liable to pay them, this being in fact matter of contract between such parties and the legislature.

Is the contract in question a contract of this nature? If it be, it is our duty to carry it into execution. Before we can say, whether it be such a contract, it is necessary that we examine it first on general principles; and secondly, in its consequences, natural and necessary, not merely contingent.

The date, cause, and consideration of it, have been stated already. Should it be enforced by law? The present intruders being first settlers, are, like all other first settlers on frontiers, not men of affluence or influence. That they have settled in direct opposition to the will of the state, that they found their claim under another state, is apparent on the record, and taken for granted in the argument.

Is it therefore against the principles of sound policy? For many contracts which are not against the rules of morality, are still void, as being against the maxims of sound policy. Per Ld Mansfield. Cowp. 89,200. If the act is in itself a violation of the general laws of public policy, there the party paying shall not have an action for money had and received. Dougl. 672.

Bond for the purchase of an office, though not within the stat. of 5 and 6 Edw. 6, yet a perpetual injunction was granted; Ld Chancellor Thurlow treating it as a matter of public policy of the law, and similar to marriage brokerage bonds, where the practice is publicly detrimental. 1 Bro. Cha. Rep. 124-5. 1 Fonbl. 214.

This case is an answer to the argument derived from 2 Wils. 133. In 7 Ves. jr. 473, is a strong case, though it was not cited at the bar; that the plaintiff could not recover, because he claimed through the medium of an illegal agreement, although it was only contrary to a regulation of the East India Company.

Contracts are void, if they are either repugnant to the welfare of the state, Co. Lit. 216. b., or against some maxim or rule of law, or in contradiction to some positive statute. 1 Pow. Con.

166. Therefore all bonds, contracts, and agreements, which have for their object a restriction of trading in general throughout England, are void, as militating against national policy, *Ib.* 1 Wms. 182, 185, whether with or without consideration, *Ib.* 187, 190, by reason of the mischief which may arise from such restraints to a man and his family by the loss of his livelihood, and to the public by depriving it of an useful member.

Marriage brocage bonds are void, because they militate against the general welfare of society. 1 Pow. Contra. 174-5. 3 Lev. 411. 15 Vin. 265. Show. P. C. 76. 1 Cha. Rep. 87. 1 *Fonbla.* 253-4. Forrest 132. Not for the particular damage to the party, but from considerations of public policy. Cowp. 343. It is not for the sake of the defendant that the objection is allowed, but it is founded on general principles of policy. 1 Atky. 352. There is another series of cases, in which it has been adjudged upon the same principle, that a party to the contract cannot have the assistance of courts to carry it into effect; it being repugnant to the welfare of the state. In the first case, Cowp. 341, the plaintiffs, foreigners, sold at Dunkirk the tea, for the price of which the action was brought, to the defendant, as they would to any other person, and in the ordinary course of their trade, knowing it was intended to be smuggled by him into England, but having no concern in the smuggling scheme itself. The plaintiff recovered. Why? Because the plaintiff was a foreigner, not bound to take notice of the revenue laws of England; the contract abroad was complete in the ordinary course of trade, and the plaintiff had no concern in the smuggling scheme. Had any of these circumstances been the reverse, the plaintiff would not have recovered.

Then follow the cases of *Biggs v. Lawrence*, 3 Term Rep. 454; *Clugas v. Penaluna*, 4 Term Rep. 466; and *Waymell v. Reed et al.*, 5 Term Rep. 599, which have been already mentioned.

These last three cases do indeed recognize that of *Holman v. Johnson*, Cowp. 341, but by refined discriminations they almost explain away its effect; because, scarcely one seller out of one hundred, who does not contribute in some degree (and even tying an extra rope around the cask, for instance, will be sufficient to prevent his recovery) in facilitating the views of the smuggling purchaser, when the transaction is understood between them. And all smuggling is not *malum in se*. 3 T. R. 422. Cowp. 343. Nor do any of the acts of parliament, inflicting penalties, some of them very severe, even death on smuggles, declare contracts void, because the goods were sold for the purpose of smuggling, and the seller assisted in the smuggling.

This act of assembly, inflicting a penalty on this transaction, proves that it is illegal. Were the court to assist the parties to carry this contract into execution, the consequences would, in the nature of things, be, that such first intruders as I have described, would sell to others of more wealth and influence, who would be tempted by the lowness of the price, at which such first intruders, conscious of their want of title, would be induced to sell, to make large purchases of the pretended rights, and form such a formidable phalanx against the clear title of the state, as to produce a civil war. Whereas if such contract be void, if they cannot be carried into execution, the right of the state will ultimately prevail. It would prevail now, were it not for a very few individuals, whose personal and political importance depends upon their continuing the champions of that opposition, which they began, and which they think it dishonourable to relinquish. Their sons will be at liberty to think, and act for themselves, with unfettered minds.

I am therefore of opinion, that this contract is repugnant to the welfare of the state, to sound policy, and that neither party can resort to the laws of the state, to assist him in carrying it into execution. If either party be entitled to the assistance of the laws of the state to execute such contract, the laws ought equally to assist the other party. Now suppose that on this contract, the seller had conveyed to the purchaser, had received the whole of the consideration money, and refused to deliver up the possession, could the purchaser, claiming the land in opposition to the title of the state, recover in ejectment? If he could not, (and it will not be alleged that he could) this is a conclusive reason against a recovery by the original plaintiff, in the case before us, were all the other cases out of question. But independent of reason, each class of the cases which I have stated, would be sufficient for the reasons stated in them, to prevent a recovery by the original plaintiff on this contract.

The last class applied so pointedly against the recovery by the original plaintiff, that his able and ingenious counsel was compelled to relinquish all reasoning on the merits, and resort to the observation, that all revenue cases in England, bend the laws till they almost break; and he gave the instance in 7 Term Rep. 601. When that case was first cited in this court, I in pointed terms expressed my disapprobation of its extent, nor am I yet reconciled to it. But our learned, ingenious and candid brother does not say, that any law was bent in the cases which I have cited, which almost independently govern the case before us. For it is not alleged, that any of the acts inflicting penalties on smuggling transactions, declare any of the contracts

for goods purchased, for the purpose of smuggling to be void. The decisions are grounded on principles of public policy alone.

It is indeed said by a great judge, upon a very remarkable occasion, that courts must not regard political consequences. 4 Burr. 2562. But it is well known to every well read lawyer, to almost every man of learning in Britain and in the United States, that the only fault ever imputed to that excellent judge, was, that he paid too much regard to political consequences, in his judicial capacity. It is perhaps because I venerate his transcendent abilities that I never have been able to discover the justice of the imputation. Nor is it necessary on this occasion to discuss the point. Because the same great judge, after twelve years more experience, says, if the question had been doubtful, arguments from utility and public convenience, ought to have turned the scale. Doug. 597. He had the preceding years, declared, that upon principles of law, conveniency and sound policy, the action in question would not lie. *Ib.* 573.

Another great judge, Lord Chancellor Hardwicke, equal to Lord Mansfield, greater he could not be, declares, that "these reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion." 3 Atky. 16.

The same ornament of the English bench, seven years afterwards, in a cause of very great importance indeed, so great that he called to his assistance the chief justice of England, the chief justice of the Court of Common Pleas, the master of the rolls, and the eminent judge Barnet, who all concurred in judgment; declares, "that political arguments in the fullest sense of the word, as they concern the governments of a nation, must and have always been of great weight in the Court of Chancery; and though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may be properly said, that it regards the public utility." 1 Atky. 352.

If there ever was a case, in which political arguments ought to have great weight, if ever, were the case even doubtful, arguments from utility and public policy ought to turn the scale, if upon principles of law, conveniency and sound policy, the original plaintiff ought not to prevail, this is that cause, perhaps more emphatically so than any other cause which ever came before any court in this state.

Here a number of people from another state, called intruders in the language of the legislature, have in combination taken possession of lands within this state, the property of its citizens, and hold these lands in defiance of its laws; and yet those violated laws are applied to, to aid the violaters in carrying into

effect their contracts respecting the property, for which its citizens have paid their money, to enable the intruders to increase their influence and force, so as to bid defiance to the state. That this is their aim, he must be an idiot who can doubt. The man of understanding, who can affect to doubt, must be a knave ; and yet forsooth, the law of the state must assist those, who hold lands in opposition to the grants of the state, to transfer their pretensions to others, who can more effectually oppose the rights of those, whom the state is under the most solemn obligation to defend and protect !

I might rest here on this point : but because next to the duty of administering justice between the litigant parties, is that of convincing the losing party, that the whole case has been examined and considered by the court, (6 Term Rep. 408,) I will take notice of some other, cases, on which some reliance has been placed by the counsel of the original plaintiff. The chief of which is *Robinson v. Bland*, 2 Burr. 1077. But it does not apply ; because that part of the contract on which the plaintiff recovered, was warranted by the laws of France where it was made, and by the laws of England, where it was to be performed.

Crowp. 734, was cited to prove, that where parliament says, you shall not wager or insure in certain cases, you may wager or insure by implication in cases not prohibited specially, although these last cases where you are at liberty to wager or insure, may be contrary to the act of parliament : but it does not seem to me, that the book warrant the position ; and if it were warranted, it would not apply to the case before us.

The case in 1 Bos. and Pull. 3, would apply if the assured had sued the underwriters.

2. I now proceed to consider, whether the act of 6th April 1802, (5 St. Laws 198) has any, and if any, what influence on this contract. This act is relied on greatly by the counsel for the original plaintiff, who says, this act clearly expresses the sentiments of the legislature, that the contracts was not before void ; that it required that the act to make it void ; and that it is a question of state policy, not for judicial construction. I will examine each of the points.

The preamble states, “ whereas certain persons, under the pretence of title derived either from the state of Connecticut, or from certain Companies known by the names of the Connecticut Susquehannah Company and the Connecticut Delaware Company, to a considerable extent of territory within this state, have by various improper practices, long endeavored to defeat the execution of the laws of this state, and to defame titles of persons holding lands by grants from the state, or the late

proprieties before the revolution, in order therefore to counteract such practices, and to preserve the just rights of this state," &c.

The 1st section declares, that no conveyance after the 1st May 1802, made of any land within Luzerne, Lycoming, and Wayne counties, shall be good or effectual to pass any right, &c. unless, &c., and it inflicts a penalty on the judge or justice who shall take an acknowledgment or proof of such deed, and a penalty on the recorder who shall record it.

The 4th sect. inflicts a penalty on any person, who shall after the 1st June 1802, bargain, sell, or convey, or by any ways or means obtain, get, or procure any pretended right or title, or make, or take any promise, contract, grant, or covenant, to have any right or title of any person in or to such lands, &c., and such promise, contract, grant or covenant is thereby declared to be utterly void, and of none effect."

Had there been nothing more in this act, there would be considerable force in the remark, that it would or might amount to a legislative construction or declaration, that such contract was not void before.

Courts ought to pay, and always will pay great attention and regard to legislative constructions; but they are not conclusive, for if they were, the legislative would become also the judicial power.

It is asked, "if the intrusion law reached this case to avoid the contract, would the last law have been made? Besides, this last law was not in force as to vacating the contract, till the 1st May, and so to the penalty, not till the 1st June after the passing of the act; which affords strong evidence, that until such time as the people of Luzerne county should have notice of the law, such contracts, which might even be made in the meantime, were not void."

In answer to the question, permit me to repeat the words of Lord Mansfield. Cowp. 434. The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have every end proposed by the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4, though the former relates to creditors only, the latter to purchasers. And yet although these two statutes were not really necessary, they always had been held in high estimation. And the same great judge declares, that they cannot receive too liberal a construction, or be too much extended in suppression of fraud.

It is well known, that commerce and mercantile credit consequent on it, were rapidly increasing just at the time that these statutes were

enacted ; the frauds incident, and to a degree peculiar to such transactions, no doubt increased in the same proportion.

Judges generally are, and frequently ought to be cautious, in applying the principles of the common law to new subjects. Some of them might and probably did express doubts, how far those principles were sufficient to suppress the mischief, which the legislature seeing daily growing, removed the doubts at once: and the statutes aforesaid, though really not necessary, probably prevented much of the growing evil. So may the last act of our legislature prevent many men from entering into the combinations, which have long proved, and which always will prove, while they exist, so dangerous to the peace, and so destructive of the prosperity, improvement and happiness of that part of the state.

General principles of law and reason would thus apply in giving construction to the law of 6th April 1802, and in judging of its influence in the construction of the preceding act, were there no proviso in the act of 6th April 1802. But when we read this proviso, "That nothing herein contained shall be so construed as to make valid any conveyances, heretofore made of any pretended title or claim to land under the colony or state of Connecticut, or either of the companies, known by the names of the Connecticut Susquehannah, or the Connecticut Delaware Company," the implied legislative construction contended for is expressly guarded against. This act therefore, so much relied on, if it has any operation on the case before us, is certainly not in favor of the original plaintiff's demand.

As to contracts made between 6th April 1802 and 1st May and 1st June respectively, they remain exactly as if this last act had not been made.

It is asked, may not the possessor devise this land? May it not descend? May it not be taken in execution, and the purchaser from the sheriff hold it till recovered by a Pennsylvania, title?

I answer, that neither the devisee, nor the heir, nor the purchaser from the sheriff can have the aid of the courts in this state, to recover land claimed in opposition to the right of the state. The consequence in the last instance will be, that no person will trust the intruder.

It is also said, that the conscience of the original defendant cannot support him in this defence; that on this contract he has obtained possession, on which he alone can obtain a warrant for the land, and that he is not ousted; that no Pennsylvania title appears; and that on this possession he can maintain trespass. I reply; that true it is, that as to land for which there is no office right, the possessor

has the right of pre-emption; but he must pay the state for the land. Now, here it was not the possession alone which the original defendant bought, but the title to the land.

But on this contract he has obtained the possession, and all the benefits accompanying it, and therefore he ought to give it up, or pay for it according to his contract, as understood by both parties. Were judges the keepers of the consciences of the parties to every suit, (we are eased of a great burthen in not having that duty imposed on us) there would be great weight in the observation; but this agreement, which the court cannot for the reason before stated, assist in carrying into effect, "may perhaps be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings. The law encourages no man to be unfaithful to his promise; but legal obligations are, from their nature, more circumscribed than moral duties." 1 H. Bla. 327-8. Per Ld. Loughborough. The parties are looked upon to treat together, as if there were no law about the matter, and so to renounce the benefits which might accrue by the law to either of them. 1 Pow. contra 201.

I concur in opinion, that the judgment below should be reversed.

BENEDICT DORSEY *against* RICHARD TUNIS et al. administrators of JOHN DUNWOODY who was special bail of LEWIS LAUMAN.

A recognizance of bail, when the party was fixed for the debt in his life-time, is entitled to a preference over bond and simple contract debt, within the act of 15th April 1794.

CASE stated for the opinion of the court.

John Dunwoody in his life-time, entered into a recognizance of special bail in this court, in the case of Benedict Dorsey v. Lewis Lauman, (*prout* record) Judgment was obtained, a *ca. sa.* returned N. E. L., and *scire facias* issued against John Dunwoody, the special bail, returnable to September term 1802, which was returned served. After John Dunwoody was fixed for the debt, by the return of the *scire facias*, he died, on or about the 15th December 1802.

The question is, whether the plaintiff is, or is not entitled to a preference in payment of his debt to the bond creditors, and simple contract creditors of the deceased, according to the true intent and meaning of the 14th section of the act of assembly, passed April 19th, 1794? If the court shall be of opinion in the affirmative, then judgment is to be entered for the plaintiff, and he is to be paid by the administrators next after the judgment creditors and before the bond creditors; if in

the negative, judgment is to be entered for the plaintiff, to be paid a rateable proportion with the general creditors of the deceased.

The court desired Mr. T. Ross, the defendants' counsel, to begin the argument.

He admitted, that the act of 19th April 1794, § 14, preferred "recognizances" to bond and common simple contract creditors, (3 St. Laws, 527,) but contended, that such recognizances as the present, were not entitled to a preferance. The legislature must have contemplated recognizances, conditioned for the payment of debts, and not such as depended on the event of another suit. The act of 4 Ann. 1705 Miller's edit. 25,) being made *in pari materia*, though now repealed, must be taken into view, as illustrative of the true meaning of the last law. The words in the old law are debts due by recognizances. To effectuate the intention of the legislature, the binding quality of the recognizance, must take effect from the caption. How otherwise can a creditor bring himself within the provision of the same 14th section? He must exhibit his account to the executors or administrators, within twelve months after public notice given in one of the public newspapers of this state. And yet the action in which the deceased became bail, may not be terminated for many years afterwards. By the exposition of the act, as contended for by the plaintiff, it must be taken for granted, that in all cases, the estate of a deceased special bail, is to be answerable for the debt in the suit; and this would impute great absurdity to the legislature.

Mr. Hallowell, for the plaintiff, insisted, that executors and administrators were bound to take notice of debts due by record. The ground of the defendants' argument is, that such a recognizance as the present, was not within the contemplation of the legislature. And yet in *Campbell v. Richardson*, 1 Dall. 131, it was adjudged, that a recognizance of bail, was a recognizance within the meaning of the old act of 1705, wherein it is admitted by the defendants' counsel, that the words are stronger for the defendants' purpose than under the present law.

He was then stopped by the court, who said that it was admitted in the case, that the defendants' intestate was fixed for the debt in his life-time. The only question submitted, was whether a recognizance under such circumstances, had not a preference over bond and simple contract debts, under the true construction of the act of 1794? There can be no difficulty in saying, that a recognizance by bail is within that act; and it has been so determined under the act of 1705.

Judgment for the plaintiff.

AT A CIRCUIT COURT, AT CHAMBERSBURGH SEPTEMBER,
1804.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of THOMAS HARTLEY, esq. *against* MARY M'ANULTY.

A deed without any consideration expressed in the body of it, but with a receipt by the grantor, for 250 specie, in full of the consideration money, is sufficient to pass the land.

A fraudulent deed, though void against creditors, is good as a voluntary deed, between the parties.

A POINT was reserved on the trial of this cause, at the last Circuit Court, which the justices continued under advisement. They now proceeded to deliver their opinions.

Yeates, J. This cause was tried on the 6th October 1803, and the plaintiff obtained a verdict for 95½ acres in Fannet township. He claimed under a sale by the sheriff, who seized and sold the same as the property of Alexander Moore. At the trial a point was made, and reserved for further consideration, whether the deed from Robert Karr, the patentee, to Alexander Moore, dated 5th April 1787, passed any estate to the grantee. No consideration was expressed in the body of the deed; but a receipt was subjoined thereto, whereby the grantor acknowledged that "he had received from the grantee 250 in specie, in full of the consideration money."

The general rule of law, unquestionably is, that to raise an use by the execution of a deed, there must either be a good, or valuable consideration; as marriage, the payment of money, &c. By a bargain and sale on a general consideration, no use is raised. 1 Co. 176, a. Park. § 553. A bargain and sale for divers good causes and considerations, without any money, is not good, though it be recited, that the bargainee was bound by recognizance for the bargainer. Cro. El. 394. And it has been held, that the consideration of old acquaintance, or of being chamber fellows, will not raise an use. 2 Rol. Ab. 783, pl. 5, 6.

But it is equally clear, that there is no indispensable necessity, that the consideration money should be contained in the deed itself. Because a bargain and sale without expressing any consideration, may be helped out by averment, that money was paid. 1 Keb. 12. 2 Inst. 672. 1 Co. 176. 7 Co. 39, a. 40, b. 11 Co. 24. 2 Rol. Abr. 786. pl. 1. 2 Mod. 250. 1 Leon. 170. Moor. 570. If no consideration is mentioned in a deed, you may enter into proof of consideration; 3

T. R. 471; but if any consideration is mentioned, and not said for other considerations, you cannot prove any other. 1 Vez. 127. 2 Wms. 804.

A consideration will arise equally where a person gives up a certain pecuniary advantage at the time of the grant, as when a sum of money is actually paid down. 2 Atky. 154. The consideration of deeds is not to be weighed in too scales. *Ib.* 514. The quantum of a valuable consideration in a deed is not regarded in law. *Ib.* 148. 2 Vent. 35. Barnard. 384. 22 Vin. 202. pl. 2. In purchases, the question is not, whether the consideration be adequate, but whether it be valuable, without fraud, within the statutes of Elizabeth. Finch's Rep. 104. 2 Cha. c. a. 159. And therefore it has been determined, that the consideration of a pepper corn is good to raise an use, to make a tenant to the præcipe. 1 Mod. 262. 2 Mod. 249. 2 Vent. 35. Indeed, it has been said, that a deed from its solemnity, imports a consideration. 1 Fonbla. 335. 3 Burr. 1663.

How then stands the case before the court? Here is a receipt from Karr to Moore, for 250 specie. We know not what were the 250, whether eagles, half-eagles, dollars, cents or dimes; but this we know, that they were specie, and we also know from the resolves of congress during the revolutionary war with Great Britian, that specie in its true signification means hard money, gold or silver, as opposed to the paper continental and state bills of credit, which the necessities of the times gave birth to. It then means something valuable, as the word coin, in the English books, and of whatever value the 250 were, whether little or great, the word specie intrinsically imports a value. This then brings it to the case in 2 Rol. Abr. 785. pl. 2. If one in consideration of a certain sum of money, bargains and sells lands, this is a good consideration to raise an use, without averment of any sum in certain; for the quantity of the sum is not material. It is a good sale, if there be any money. Moor. 373.

The deed in question therefore passed and interest in the lands of Alexander Moore, and was recorded. Even considered as a voluntary deed, it was good as between the parties. And the lands having been taken in execution as the property of Moore, are well passed by the sheriff's deed to the purchaser. And consequently, my opinion is, that judgment be entered for the plaintiff.

Smith, J. A deed or other grant made without any consideration is, as it were, of no effect, for it is construed to enure to be effectual only to the use of the grantor himself. 2 Bla. 296, cites Perk. § 583. A bargain and sale is not good, if no consideration be alleged, not so much as *pro quadum pecuniæ summa*. T. Ray. 201 7. Vin. 421. pl. 10. But upon the issue of *non concessit*, the want of setting it forth is cured by ver-

dict for it shall be intended to be proved on the trial, 1 Vent. 108. 1 Lev. 308. If a man pleads a bargain and sale in which no consideration of money is expressed, it must be averred that it was for money, and the words for divers considerations shall not be intended for money without averment. 7 Vin. 421 pl. 3. Cites Moore 569 2 Rol. Abr. 786. 1 Co. 176. Though no valuable considerations be expressed in the indenture, yet if any were given, the same may be averred, and the land does sufficiently pass. 4 Inst. 672. 7 Vin. 421, pl. 4. If the deed expressed for a competent sum of money, though the certainty of the sum be not expressed, it is good enough; for, against this express mention of the deed, no averment nor evidence shall be admitted. 7 Vin. 421, pl. 3. 1 Bac. 277. Moor 378. 569.

If one bargain and sell lands in consideration of a certain sum of money, it is sufficient to raise an use. 2 Rob. Ab. 786.

The act of 3d April 1781, directs that all debts, contracts, &c. shall be liquidated by a scale, by reducing them to the true value in specie. The creditor shall recover the true value of his debt reduced to specie. 1 St. Laws 880, 882. Another act of 21st June 1781, declares, that congress, &c. have been necessitated by reason of the scarcity of specie, to emit large sums of paper money, &c., and the quantity of specie being of late considerably increased within the United States, that congress have recommended the repeal of all laws making paper bills of credit equal to gold and silver. 1 St. Laws 902. See also § 12, 14, 15 and 16, of the same act.

In the resolves of congress of 22d May 1781, the terms real efficient money, that is to say, in silver and gold, specie value, solid coin, are all used as synonymous. Ibid. 7 May. Specie value is used in the same sense.

The principles and rules of the common law as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every object proposed by 13 Eliz. c. 5, relating to creditors only, and by 27 Eliz. relating to purchasers. Cowp. 434. 1 Bac. Suppl. 582. Whether a transaction be fair or fraudulent, is often a question of law: it is the judgment of law upon facts and intents. 1 Burr. 474, 497. 1 Bla. Rep. 196. Nothing is so silly as fraud. Lofft. 53. All statutes against fraud shall be liberally and beneficially expounded, to suppress the fraud. 3 Co. 82. 5 Co. 60, 77. 1 Atky. 205. Cowp. 434. The common law doth so abhor fraud and covin, and all acts as well judicial, as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful, and unlawfull. 3 Co. 78. 1 Burr. 395. Inst. 218, 215. There is no instance, where the original

contract is fraudulent, that any subsequent act can purge it. 1 Wils. 323.

If A. seised of land in fee, maketh a fraudulent conveyance, to the intent to defraud purchasers, against stat. 27 Eliz., and continueth in possession, and is reputed owner; B. entereth into a communication with A. for the purchase of it, and by accident B. hath notice of this fraudulent conveyance, and yet concludes with A., B. shall avoid the fraudulent conveyance, notwithstanding his notice. 5 Co. 61. b. per. Wray. C. J.

A voluntary conveyance is binding on the party, and all claiming under him. 1 Fonbla. 264, 270. Cro. Jac. 270. A. indebted in 100l., made a deed of his goods to B. for 20l., though the deed is void against all creditors by 13 Eliz., yet against the party, his executors and administrators, it remains a good deed. Yelv. 197. Cro. Jac. 270. 3 Co. 82. Cro. El. 445. 13 Vin. 517, pl. 8, 554. 2 Bac. 605. Although a purchaser for valuable consideration within 27 Eliz., hath notice of a fraudulent conveyance before he purchases, yet after the purchase he shall avoid it; for the statute expressly avoids such conveyances; so that, whether the purchaser hath notice of them or not, is not material. 5 Co. 60. b. Gooch's case.

Supported by foregoing authorities, I am of opinion,

1. That the deed from Karr to Moore is sufficient to convey the land; the consideration being stated in the receipt is as good in law, as if it had been mentioned in the body of the deed. 2 Atky. 202.

2. The word specie has become technical in the United States, and by the acts of the legislature of Pennsylvania, it is synonymous with gold and silver, real sufficient money, solid coin or current money. The receipt in this case is for 250 specie, or suppose 250 to be omitted, for specie (i. e. for solid coin) "in full consideration for the above land." These words are just of the same force and effect, as "for a competent sum of money," or in consideration "of a certain sum of money" which have been held sufficient.

3. Had the deed from Karr to Moore been made *bona fide* and for a valuable consideration, the estate would have vested in Moore, and been liable to his debts. If as was stated by the defendant's counsel, it was made by Karr. "to the end, purpose and intent, to delay, hinder, or defraud creditors," &c. it shall be deemed, and taken only as against such creditors, to be clearly and utterly void by stat. Eliz. c. 5. Yet, as against Karr, his executors and administrators, it is a good deed, and consequently the land so conveyed was liable to Moore's debts.

4. Whether the lessor of the the plaintiff had notice before he bought, though not before his judgment, is not material; as has

been the settled law ever since the decision of Gooch's case and Stander's case therein cited. 5 Co. 60. b.

I concur that judgment be entered for the plaintiff.

PHILIP EVERT *qui tam.* against THOMAS BARR.

In debt *qui tam.* on the act against usury, the usurious contract in point of date, must be proved as laid, or the variance is fatal.

DEBT 711. on the act against usury of the 2d March 1723. 1 St. Laws 193. Plea, *nil debet* and issue.

On the trial at the last Circuit Court, the defendant's counsel moved for a nonsuit; the contracts for the usurious loans, as alleged in the declaration, differing in point of date from the evidence adduced.

The court then directed that the trial should proceed; and should a verdict pass for the plaintiff, they would consider afterwards how far the testimony would warrant a recovery on the whole, or any of the counts in the declaration, in as full a manner as if the same had been then determined. And it was mutually agreed, that the verdict should be entered accordingly.

The jury found a verdict for the plaintiff for 711.

On a rule to show cause why the verdict should not be vacated, and in lieu thereof a verdict and judgment be entered for the defendant;—

Yeates, J. stated the evidence which had been given on the trial, and the seven counts laid in the declaration particularly, and then proceeded.

Hence it appears that no proof was offered on the first, second, fourth, and fifth counts.

The third count would have been, correctly stated, if the 30l. had been alleged to have been loaned on the 31st December 1794, instead of the 1st January 1795; and if the 15l. laid to have been forborne, the payment of had been alleged to have been from the 8th September 1794, instead of the last day of February 1795.

The sixth count would have been correct, if the forbearance of the 215l. 11s. had been stated to have been from the 1st November 1797, instead of the last day of October 1797. And the same objection holds precisely as to the seventh count.

There seems therefore a fatal variance in all the counts; and whatever our feelings may be as men, we must submit to the authority of *Carlisle qui tam. v. Trears, Cowp, 671.* In the language of Lord Mansfield, "the usurious contract must be proved as laid; whereas

the contract proved in this case, is totally different from the contract stated in the declaration.”

Rule made absolute.

Messrs. Duncan and Orbison, *pro quer.*

Messrs. S. Riddle and Dunlap, *pro def.*

Lessee of PHILIP DAVIS *against* DAVID COLLINS.

Parol evidences of the declarations of a deputy surveyor, that he had received money to take out a warrant which had been burnt in his house, but would soon take out the warrant, not admissible.

EJECTMENT for 37 acres and 63 perches of land, in Montgomery township.

To prove the plaintiff's title to the lands in controversy, his counsel offered Robert Mackey as a witness, to prove the the declarations of John Armstrong, formerly deputy surveyor of the district, made in 1763, that he had received money from James Davis, (the father of the lessor of the plaintiff, and under whom he claimed) to take out a warrant for him, which he had not done, and that the money had been burned in his house at Carlisle, but that he would soon take it out for him.

Previous thereto, the lessor of the plaintiff was sworn, that he had carefully searched for the receipt for this money amongst his father's papers, but could not find it. Several papers were lost during the Indian war.

The testimony was objected to by the defendant's counsel. The declarations of Colonel Armstrong are offered to establish a fact; the payment of the money for a warrant. Was he living and present in court, the fact must be proved by his oath. No general powers were given to him by the Board of Property to receive money in behalf of the proprietaries. No receipt is produced, nor has it been shown that one ever existed. The contents of such receipt might in such case be probably given in evidence. But the evidence offered is of the most loose and uncertain kind, and would lead to the most destructive consequences. If the recollection of a conversation which passed forty-one years ago, is admitted as the ground-work of a title against an adverse possession of many years, adieu all security to the rights of landed property.

The plaintiff's counsel answered. It is a fallacy to speak of Colonel Armstrong, in the present business, as a mere stranger. It is well known, that the deputy surveyors, in this district, were in the constant habit of making surveys, on payments made to them of 5l. per hundred acres; and that such surveys have always been approved of in the land office. Col. Armstrong was much in this practice, as appeared by his own oath, in Turbett's

lessee v. Vance, tried at Nisi Prius, in this county, in May 1789, and by the oath of William Lyon, esq., in Woods's lessee v. Galbreath, tried at Nisi Prius, in Carlisle, May 1798, in both which cases, the surveys were sanctioned by the court and jury. He must be considered as the proprietary agent in this particular, and in some measure as a party, representing their interests. It is admitted, that his receipt for the warrant money, would be received in evidence. But on what ground we ask? It is but his written declaration of a fact; which, if he is considered in the light of a stranger, and not as a public agent, is not admissible. We are unfortunate enough not to possess the paper, nor have any copy, nor any witness who has seen it. We supply the loss by the next best evidence in our power, the declarations of Armstrong, to an impartial witness. The law is too reasonable, to enjoin impossibilities on any suitor. As to the observation, that the evidence proposed, cannot be depended on with safety, we agree that it is inferior to a written document. But the argument proves too much, since carried to its utmost extent, it would supersede all parol testimony, as contrasted with paper. The jury on an attentive consideration of all the circumstances, must pronounce on its credibility.

Per cur. In the two instances cited, the court were justified by the early usage, which prevailed in Cumberland county, in receiving evidence of surveys made by a deputy, without warrants. It certainly relaxed the general rule to a considerable degree; and we do not feel ourselves disposed to go one jot beyond what our predecessors have done. The evidence proposed, is replete with incalculable evils to the community. No man could depend on the goodness of the title to his land; every thing would be set afloat, and a torrent of perjury overwhelm the country. As a proof whereof in the present instance, we feel it our duty to assert, that when the witness offers to swear, that he heard Colonel Armstrong say, he would soon take out the warrant, though the money he had received, had been burnt in his house, his story is wholly incredible; because we well know, that where he had received his fees, and had made a survey, the notes whereof were burnt in his office before making a return, he uniformly demanded a compensation for making a new survey. But it is not on this ground, that we overrule the evidence.

Verdict for the defendant.

Messrs. Duncan and S. Riddle, *pro quer.*

Messrs. Watts and Brown, *pro def.*

WALTER BEATTY and NANCY his wife *against* SAMUEL SMITH.

A recognizance in the Orphan's Court for the distributive share of a child, is in nature of a judgment, and cannot be reduced by circumstances or considerations anterior to such recognizance. Notice of a set-off should be certain and particular; and if the set-off is to be proved by the acknowledgements of the party, it should be so expressed in the notice.

DEBT 137*l.* 14*s.* 6½*d.* *sur* recognizance, in the Orphans' Court. Plea, payment with leave to give the special matter in evidence. The facts are these:

Samuel Smith, father of the plaintiff Nancy, and of the defendant, died in 1763, intestate, seized of a tract of 408½ acres of land, having a widow, four daughters and one son, his youngest child, then aged six years. Nancey, the plaintiff, was the youngest daughter, and then aged about seven years.

The family were brought up together, and lived on the land, until the daughters were severally married. Nancy married in 1778. The defendant occupied the lands afterwards for his own use.

On the 4th September 1797, the plaintiffs applied for a partition or valuation of the real estate. The jury finding that the same could not be divided without prejudice to the whole, made a valuation thereof, and the defendant accepted the lands, and entered into recognizances, for the payment of the distributive shares of his sisters on the 27th November.

The defendant gave notice of several matters, for which he claimed set-offs. 1. That the improvements on the land, made since the death of the intestate, until the time of valuation, being appraised with the land, he claimed to be allowed an equivalent therefor, proportioned to each child's share. 2. He also claimed an allowance for taxes paid for the real estate between 1780 and 1797. 3. Likewise for his trouble, costs and expenses, in defending an ejectment brought against him by Henry Snevely, according to a family agreement, and in which there was a subsequent eviction on the 23d April 1799, of 47 acres, part of the lands appraised; and 4th, for the taxes paid by him, on those 47 acres.

On the defendant's offering to give evidence of these set-offs, the plaintiffs' counsel excepted thereto.

The recognizance is a debt on record, binding the lands of the cognizor. It is given in pursuance of the decree of a court of common jurisdiction, and is equivalent to the judgment of a common law court. The subject matter has passed *in rem judicatam*, and it cannot be overhauled or examined into, in this collateral way. But independent thereof, the two first claims are not proper matters of set-off. If any real improvements made at the proper costs of the defendant, have been valued

by the jury, (which we utterly deny,) he ought to set in opposition thereto, the profits of each child's share of the real estate, during the period of his enjoyment of it, for his exclusive benefit, and the balance be struck on a fair statement.

Another objection occurs to the testimony. The notice is too general. It does not state the improvements, their nature, value, nor when made. It gives no materials, which may be combated by other proof. The notice of a set-off, should be minute and certain. Where any debt is intended to be insisted on in evidence, notice must be given of the particular sum or debt, so intended to be insisted upon, and on what account it became due. Bull. 1792.

E contra, the defendant's counsel contended, that the recognizance was only a more formal solemn contract, on vesting the intestate's real estate in such child as took it at the appraisement.

It is not in the nature of a judgment, but is simply the acknowledgment of a debt upon record, binding the party's lands. It would be highly unjust, that the improvements made by the son, should be appraised by the jury, and he be compelled to pay $\frac{1}{4}$ th parts thereof again to his sisters.

The present jury must necessarily judge, whether the plaintiff's share of the improvements does not surmount their claim of rents, and act accordingly. It is certain, that the notice of the sets-off might be much more special; but if the plaintiffs objected to the generality of it, they ought to have made the exception at the time, and a more particular account would have been furnished to them, or their counsel. The liberality of the practice in this state is well known to the court.

Per cur. Unquestionably the recognizance in the Orphan's Court is in the nature of a judgment. The interests of minors as well as persons of full age, would be strangely affected, if a doctrine should prevail, that while they were divested of their interests in the land, their distributive shares of the valuation should not be placed on a secure and permanent footing. If they are liable to have their dividends reduced, by circumstances or considerations which have occurred anterior to the recognizance solemnly given, they will be but badly protected by the law. Why was not this defence set up by the son in the Orphan's Court, previous to their decree and his subsequent recognizance? Can any good reason be assigned for it. We cannot presume that the inquest have appraised valuable permanent improvements made at the son's expense, as the property whereof the father died seized.

The testimony on the two first items must be overruled; as to

the two last items which have happened since the valuation, as it is said under the agreement of the family, evidence applicable to them may be given.

The defendant then offered to prove the plaintiff's acknowledgment made since the valuation of the lands, that certain matters anterior thereto were justly due from them, and ought to be allowed; and cited defalcation act. 1 St. Laws 65.

Sed per cur. The defendant is not compellable to make a set-off; and having been silent as to these acknowledgments in his notice of set-off, it would be a surprise on the plaintiffs to urge them at present. They must be the subject of a future action.

The plaintiff's counsel agreed that $\frac{1}{4}$ th of the costs attending the valuation and confirmation of the lands in the Orphan's Court, and also of the costs in Snevely's ejectment, should be deducted from the recognizance, and that the jury should ascertain how much the defendant was entitled to for his trouble and expenses in defending the ejectment, and charge $\frac{1}{4}$ th part thereof to the plaintiffs.

The court recommended to the parties, that an amicable action should be entered, to settle all the family disputes. They observed, that the children having been all brought up together on the land, it was highly probable, that such improvements as had been made on the premises during the minority of the son, were effected by the general stock. When the daughters married and left the farm, they were respectively entitled to their proportions of the rents and profits, deducting thereout their shares of the taxes: if any permanent improvements had been made at the exclusive costs of the son, which afterwards were valued by the inquest, the daughters should be charged with their proportions thereof; but if such improvements had not been so valued, then they were entitled to the full balance.

To this the plaintiff's counsel agreed; but the defendant refused, unless the whole matters were submitted to the jury in the present suit.

The jury gave a verdict for the plaintiffs for 162*l.* 7*s.* 8*d.*

Messrs. Duncan, S. Riddle and Brotherton, *pro quer.*

Messrs. Watts and Orbison, *pro def.*

CHARLES O'BRIAN *against* MICHAEL COSKREY.

Where a testator has become surety for one by bond, and a recovery is afterwards had against his executor named as his administrator, who pays the debt, he may recover the same against the principal, without naming himself in his representative character.

INDEBITATUS *assumpsit* for money had and received, and money paid, laid out and expended, to the use of the defendant. Pleas, *non assumpsit* and payment.

It appeared that one Francis Coskrey had become security for the defendant in three bonds to William Richardson, wherein they were jointly and severally bound. The defendant having removed from Baltimore county in Maryland, into Franklin county, suits were brought on the bonds by Richardson against Charles O'Brian, as administrator of Francis Coskrey, in Baltimore county, returnable to February term, 1802, on which judgments were confessed by him on the 16th February 1802, and he afterwards discharged the same : and this suit was brought to recover the money so paid, with interest.

The defendant produced the exemplification of the last will of the said Francis Coskrey, duly proved in Baltimore county on the 9th November 1799, whereby it appeared that Charles O'Brian was constituted the executor thereof. His counsel insisted, that the irregularity of the proceedings in the now plaintiff confessing a judgment as administrator, instead of pleading in abatement to the writ that he was executor, afforded evidence of collusion, of which he could not profit himself. But at any rate, this suit should have been brought in his representative and not in his individual character. The very case is put by Ld. Ch. Just. Ellenborough, in *Ord v. Fenwick*, executrix. 3 East 105, 109. Where the executrix has been sued on the obligation of her testator, who had become surety for the defendant, whose debt she has been obliged to pay, the law will raise an implied promise by the defendant to her as executrix, to repay the money ; and in this character alone she can entitle herself to recover it.

The plaintiff's counsel answered, that whether there was fraud or not, in the recovery in Maryland, was a matter of fact to be determined by the jury. O'Brian was no more bound to take advantage of the formal defect in the process, than he would have been to have put in the plea of the statute of limitations to a just demand, the recovery whereof was barred by positive law. The case cited from East did not apply. There the question was whether a count in *assumpsit* to the plaintiff as executrix, for money paid by her to the defendant's use, might be joined with another count upon promises made to the testator. It does not appear whether O'Brian paid these judgments with the effects of the

testator, or with his own money. If he paid them with his money, a recovery in this action will not make it assets ; and the naming of the plaintiff in his representative character would be mere surplusage.

By the court. We see no reason to doubt the justice of the plaintiff's demand.

If the case of *Ord v. Fenwick* furnished a legal objection to the plaintiff's recovery in the present form of action, it would seem, that he is without remedy ; and the error or oversight of the attorney of Richardson would effect the loss of the debt. Should he bring his action as executor, the variance between this form of suit and the recovery in Baltimore, would be urged against him ; and if he sued as administrator, he might be defeated by the production of the letters testamentary, which would show that he was executor, and not administrator. But circumstanced as this case is, we think the suit may be supported : if the defendant's counsel should think otherwise, we will at any time seal a bill of exceptions.

The jury gave a verdict for the principal sum and interest, without leaving the court.

A motion for a new trial was afterwards made, and overruled by the court. A bill of exceptions was afterwards sealed, at the instance of the defendant's counsel.

Messrs. Dunlap and Clagget, *pro quer.*

Messrs. Hamilton and Orbison, *pro def.*

The argument of this case, afterwards, on the 31st March 1808, came on before the Supreme Court in Philadelphia, when after fully hearing Mr. J. Read of counsel, with the defendants below Tilghman C. J. and Brackenridge, J. affirmed the judgment of the Circuit Court, without hearing Mr. Meredith on the other side.

The chief justice, observed, that even supposing the record of the judgment in Baltimore county not to be good evidence, which was denied, still it appears in evidence, that O'Brian was the executor of Francis Coskrey, and as such liable to pay the bond, in which his testator was surety for Michael Coskrey ; and being so liable, he had paid it. This certainly showed a good cause of action against the defendant below, who was the principal in the bond ; and the plaintiff might name himself executor, or not, in the suit, at his election.

AT A CIRCUIT COURT, AT UNION TOWN, OCTOBER, 1804.

CORAM, YEATES AND SMITH JUSTICES.

Lessee of GEORGE HUNTER *against* ISAAC MEASON, esquire, and
CHRISTOPHER WELLS.

Ejectment may lie for an island, without a survey ; so where the adversary forcibly prevents the survey.

The owner of a warrant or application is bound to shew the lands to the surveyor, and furnish provisions and chain carriers ; and if he refuses to survey, application should early be made to the Board of Property. So if a survey is made with which the party is dissatisfied. If the survey is fairly made without the application of the owner, the surveyor acts as his agents, and his acts are binding on him.

EJECTMENT for 400 acres in Bull Skin township.

The plaintiff claimed under a warrant to Jacob Frelick, dated 30th July 1784, for 400 acres, lying on both sides of the Turkey Foot road, leading to Fort Pitt, about five miles from Hatfield's mill, on the waters of Yohiogeney, including both sides of Maple Run, and the place called the Mill Seat, and likewise a large spring, a cabin, and cleared land. Interest to commence from 1 March 1780. In consideration of 5s. Frelick conveyed to Hunter on the 18th May 1796.

The description in the warrant did not correspond with the lands in controversy. There was a cabin called Lindsay's between 100 and 150 yards from the Turkey Foot road, and between 3 and 4 miles from Hatfield's mill. Near it was a good spring, some few trees deadened, but no land cleared. A branch of Poplar run, formerly called Maple run, came within half a mile of this small cabin, but there was no mill seat within several miles of it.

A letter from the deputy surveyor to the lessor of the plaintiff, dated 22d November 1792, was shown in evidence, acknowledging the receipt of the warrant, which would be attended to, as soon as possible ; also another letter dated 17th January 1793, wherein the surveyor says, "he has been at a loss for the designation of the warrant, but thinks he has at last discovered the spot. He will execute the warrant as soon as he can, but does not know Maple run."

No survey was shown in evidence, but a receipt dated 1st September 1795 from the deputy surveyor for 15 dollars for surveying fees, expenses of hands, &c. was produced. A survey had been made of other lands, but it was not shown in evidence.

The defendants produced no title, resting on the insufficiency of the plaintiff's claim.

By the court. The plaintiff is clearly barred from recovery by the express terms of the limitation act of 26th March 1785, § 5.

2 St. Laws., 282. It must not however, be understood, that in every possible case, a survey must be produced by the plaintiff in ejectment. An island described with precision in a warrant, does not seem to be within the mischiefs intended to be prevented by the limitation act. So the adversary preventing a survey by force, may hinder in this instance the operation of the prohibitory words of the law. But it must appear in general, that the party has done all in his power to effectuate a survey; and failing herein, his negligence shall bar him. Upon the most precise and descriptive warrant or application, it is the duty of the owner, to show the lands intended thereby, to the surveyor, and to furnish provisions and chain carriers, or pay the expenses thereof. If a survey is made, with which he is dissatisfied, he should without delay, complain to the Surveyor General or Board of Property, and pray for redress, otherwise the survey will conclude him. But it is certainly true, that the deputy surveyor may execute such warrant or application in his hands, without the personal attendance of the owner, or any one in his behalf. Should he do so, the owner becomes subjected to his acts, as he thereby discharges the office of an agent for his principal, unless there is some fraud in the case.

If the surveyor shall refuse to execute the survey on the lands being shown to him, and an offer to pay the expenses attendant thereon; a complaint should be made in a reasonable time to the Board of Property, who will direct a special order to issue; and the deputy surveyor will be subjected to a removal from office. These principles are founded on commonsense, public convenience, and a regard to the common safety, and are the common law of the country. Judging by these rules, the plaintiff in every point of view, is precluded from recovering, the premises in question.

The plaintiff's counsel suffered a nonsuit.

Messrs. Young and Haddon, *pro quer.*

Messrs. J. Ross, and Meason, *pro def.*

Lessee of JOHN PORTER and ANDREW PORTER *against* ALEXANDER NEELAN.

Sheriff's sale of lands without a *venditioni exponas*, invalid.

EJECTMENT for 200 acres in Luzerne township.

The plaintiff claimed the lands under a sheriff's deed. They were levied on as the property of Richard Hawkins, but sold without any writ of *venditioni exponas*. The only question before the court, was, whether the defect of this writ, vitiated the sale.

By the court. The act of 1705, "for taking lands in execution "for payment of debts," expressly directs, that on the condemnation of the lands, a *venditioni exponas* shall issue, and under this authority the sheriff sells the lands. The act of 23d March 1764, is a strong exposition of the former law. It renders sheriff's deeds and sales made *bona fide*, theretofore, before the publication of the act, for valuable consideration, valid in law, though there had been no *venditioni exponas* issued. But the act is in this particular, wholly retrospective, and has no effect on future cases. The necessary consequence is, that we cannot validate the present sale, and the deed made thereon on the 26th April 1791.

The plaintiff suffered a nonsuit.

Messrs. Addison and Kennedy, *pro quer.*

Mr. J. Ross, *pro def.*

ROBERT JONES *against* CHARLES CONOWAY and PRISCILLA his wife, THOMAS GADDES and THOMAS BOWELL, executors of JONATHAN REES,

What counts may be joined in the same declaration.

Statutes of limitations, only take place from the time when the right of action accrues; and if there be fraud, from the time of its discovery. Rule of estimating damages where a negro has been sold as a slave, and afterwards proves to be a freeman.

THERE were three counts in the declaration.

The first was in nature of a deceit, in the testator affirming negro Will to be a slave for life, and selling him to the plaintiff for 100*l*. Virginia currency, equal to \$333 33½ as such, whereas in truth he was a freeman, and afterwards duly liberated. The second count was for 500 dollars, had and received to the plaintiff's use; and the third for the like sum paid laid out and expended at the instance of the testator.

It appeared in evidence, that the negro was brought into this state in the spring of 1781, by one Simpson, and sold by him to Rees. About 1786, Rees sold him, then aged about 25 years, to the plaintiff, Jones, for 100*l*. Virginia currency, and received the consideration money.

The negro brought a writ of *homine replegiando* against the plaintiff, returnable to December term 1799, and the defendants, after the death of Rees, were duly notified thereof, and were required to take upon them the defence. In March term 1801, the suit was tried, and a verdict found for the plaintiff, with 254 dollars damages. But the declaration having only laid the damages at 100 dollars, a *remittitur* was entered of 154 dollars, and judgment taken for the residue. The costs amounted to \$18 59, which with the damages, were paid by the then defendant, and now plaintiff, Jones.

To the present action, the defendants pleaded the general issue of *non assumpsit* and *non assumpsit infra sex annos*.

Mr. J. Ross, for the defendants, contended, that here was a misjoinder. Deceit and *assumpsit* cannot be joined together in the same action. 2 Show. 250. It is only in the case of an express warranty, that *assumpsit* is the proper form of action, according to the case of *Stuart v. Wilkins*. Doug. 18. Here there is no evidence of an express warranty. It is inferred from the circumstance of a sound and full price, having been paid for the negro. No circumstances of fraud exist in the present instance, which can distinguish it from *Bree v. Holbeck*. Doug. 632, (657.)

Mr. P. Campbell, for the plaintiff, answered, that the different counts might be well joined, there being the same plea and judgment in each; and so it was in the case of *Stuart v. Wilkins*, which has been cited.

It would have been absurd for the plaintiff to have instituted his suit, until the question of the negro's freedom was determined; and the statute of limitations only runs from the time of the injury received. Notice was given to the defendants of the institution of the *hominè replegiando*, and they were called on to defend the property sold by their testator. This case is very readily to be distinguished from *Bree v. Holbeck*, where the administrator with the will annexed, found a mortgage among the papers of his testator, and parted with it *bona fide*, as a marketable commodity. For here Rees either knew, or was bound to know, that the negro was no slave. The issue to be tried by the jury, is, whether he did not affirm him to be a slave, and sell him as such to the plaintiff. Lord Mansfield says, there may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, may be fraudulent; as in the case of Sir Crisp Gascoyne, who insured a life, and affirmed it to be as good a life as any in England, not knowing whether it was so or not. And there may be cases too, which fraud will take out of the statute of limitations. Doug. 632, (656-7.) In *Cripps v. Reade*, 6 Term Rep. 606, Lord Kenyon said, he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeck*, and in other cases where a regular conveyance was made, to which other covenants were not to be added.

By the court. There does not appear to be any error in the joinder of the different counts in this declaration. The true distinction does not rest on the sameness of the process, plea and judgment; but on this consideration, whether the action is founded on tort or contract; if the former, it may be joined with

any tort, and if the latter, with any contract. 2 Bl. Rep. 849. 2 Wils. 319. Sed vid. 1 Term Rep. 276.

Nor does the statute of limitations seem to apply to this case. The bar only takes place from the time when the right accrues, and not from the time of making the promise. 3 Burr. 1281. The jury are trying a question either of active or constructive fraud. Wherever there is a fraud, the statute of limitations is no plea, unless the fraud be discovered within the time; 3 Wms. 142, nor even if the fraud be discovered within six years, unless the defendant were conscious of it. Doug. 655. 1 H Black. 635.

While the slavery of the negro was uncontested, the plaintiff had no ground to suppose he had been injured or deceived; but when he obtained his liberty in a due course of law, his right of action accrued against the defendants.

The true rule in assessing the damages seems to be, by fairly estimating the yearly services of the negro during the time he was held by the plaintiff, and deducting thereout his clothing, maintenance, and other necessary expenditures. As far as this balance exceeds the yearly interest of the consideration money, it should go towards the payment of the principal sum. For the residue, together with the 100 dollars damages, and 18 dollars and 59 cents costs, and a reasonable sum for defending the action of replevin, and interest on the different sums, the plaintiff appears entitled to a verdict, as the fair measure of his damages.

Verdict *pro quer.* for \$425 damages.

Lessee of JAMES RODGERS *against* JOHN GIBSON. THOMAS R. GREGG and JOSHUA GIBSON, jun.

A judgment creditor is not considered as a purchaser or mortgagee, within the words of the recording act of 18th March 1775. Sheriff cannot sell more lands than have been levied upon. The inquisition cannot enlarge the levy, as returned.

EJECTMENT of one fourth part of Youghiogeny Forge, and 150½ acres of land, about three quarters of a mile below Connelsville.

It appeared in evidence, that John Gibson was originally seised of the lands in question, and conveyed one moiety thereof to George Lamb, his brother-in-law; the one fourth part of the whole to his use absolutely; and the other fourth in trust for his father, Thomas Gibson, and a deed was accordingly executed by the said George to the said Thomas, dated 12th June 1797.

The plaintiff claimed the premises under a sheriff's sale, founded on two judgments against the said George Lamb, the one entered up 17th July 1798, and the other obtained in September term following.

Defence was taken by James Lea, (who also married a daughter of Thomas Gibson) under a deed from Lamb and wife, to him, dated 18th June 1798, in consideration of 1000*l*. It was acknowledged on the 13th March 1799, and recorded on the 22d May 1800.

A question arose, whether this conveyance being unrecorded near, two years after its execution, must not be postponed to the judgments rendered against Lamb in the intermediate time; or in other words, whether a judgment creditor should not be considered as a purchaser or mortgagee, within the words or spirit of the act of 18th March 1775 entitled, “a supplement to the act, entitled an act for acknowledging and recording of deeds?” 1 St. Laws 713.

The court after argument declared, that it was not within their knowledge that this point had been decided since the passing of the law of 1775. The true construction of the legislature’s meaning must necessarily be collected from their own words. The preamble recites, that “by means of the different and secret ways of conveying lands, tenements, and hereditaments, divers persons may be injured in their purchases and mortgages by prior and secret conveyances, and fraudulent incumbrances,” &c. It then enacts, that “all deeds and conveyances concerning lands shall be recorded in the office for recording of deeds, in the county where such lands lie, within six months after the execution of such deeds or conveyances; and that every such deed and conveyance which shall not be so recorded, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance, under which such subsequent purchaser or mortgagee shall “claim.”

It is evident, that neither the expressions of the preamble, enacting clause, or exception, embrace the case of a judgment creditor. 2 Wms. 491. But it has been contended, that judgments and mortgages are classed as incumbrances, and bear a considerable analogy; the former bind all the lands of the debtor, the latter only those comprised in the deed; but both are subject to the mischiefs of secret conveyances. This is true, but a clear distinction rests in this; that the valuable consideration given or advanced on a mortgage, is parted with on the security of the mortgaged premises, but a person is often trusted as well on the security of his person and effects, as of his lands; and this may afford a solid ground for the words used in the law. 1 Wms. 279. 2 Ves. 662. The evils intended to be guarded against, seem to be, that purchasers of mortgagees or real property

should not be affected by prior deeds for the same lands, unrecorded within the stipulated periods; because they expend or advance their money, on finding that there exists no prior incumbrance on record on the property.

If the legislature meant to extend the provision to judgment creditors, would they not have used apt words indicative? As the case appears to the court, they are of opinion, that the recording act of 1775, cannot influence the decision of the present question.

Many circumstances have been relied upon by the plaintiff's counsel, to show that if the transaction between Lamb and Lea, as to this deed, was not fraudulent, yet being taken by the wife of Lea, in his absence, without proper authority to secure a pre-existing debt, it amounted only to a proposition to sell for a given price; and therefore it became necessary to show the assent of Lea thereto, in a reasonable time. They have insisted, that Lea should unequivocally have shown, that he had given Lamb credit for the 1000*l*. consideration money absolutely, immediately on being informed of the transactions: that if Lamb was bound by his conveyance, so also should Lea be bound; and that he could not make the same valid or invalid at his pleasure by his assent or dissent, at the expiration of several months, to the injury of honest creditors, whose liens would have attached to the lands, in case the interest of Lamb was not divested. The acts of Lamb, at and immediately before and after the execution of the deed, and his letter to Lea accompanying the same, evidently show that the interest of the former in the lands was considered as still subsisting.

On the other hand, it has been contended by the defendants' counsel, that there is not the smallest suspicion of fraud between Lea and Lamb, though nearly connected by marriage, the most explicit proof having been given of a large debt being due by the latter to the former. That Mrs Lea came up from the State of Delaware, distant between 200 and 300 miles, by her husband's directions, with the account and a letter demanding payment, and from the nature of the thing she must necessarily have been empowered to take any proper measures for the security of the debt. That her acceptance of the deed involved in it his assent thereto, and at least was binding upon him until he gave some equivocal proof of his dissent thereto. That Lea's taking possession of the one fourth of the forge on the 15th October 1798, under the terms of covenant in the conveyance, was conclusive evidence of his assent; which was still more strongly confirmed by Lea's taking no steps to recover his large debt against Lamb, though he actually proceeded

in the Circuit Court of the United States for the district of Pennsylvania, against John and George Lamb for their company debt.

The court declared, that all there circumstances should be taken into view by the jury, and duly contrasted, so as to enable them to form a dispassionate judgment on the whole. The non-production of all the family letters, on the subject of the supposed sale, added to the doubts which naturally arose in the case. The letter from Lamb to Lea, dated 7th June 1798, contains strong expressions. He offers him lands at his own price, and tells him that his brother-in-law, Nathaniel Gibson, had offered to buy the one fourth of the forge at 1200*l.*, but had no money. He subjoins this postscript: "I have concluded to make a short deed, and forward it by sister Eliza, for the one-fourth of Tough Forge: and have stated to her, that if I can raise the money this fall, I will do it, as she says thee will prefer it." The answer hereto has not been shown; but a brother in law who saw it, has declared, that Lea wrote to Lamb a short time after, and he therein said he wanted money and not property; and it is worthy of observation, that though he directed possession of the forge to be taken on the 15th October, he did not obtain an acknowledgment of the deed until the 13th March 1799, nor record it until the 22d May 1800. On the whole matter, the jury will judge for themselves.

On both writs of *fieri facias* the sheriff has returned "levied on one-fourth part of Tough Forge." The inquisition condemning the lands is contended to be explanatory. But it cannot possibly enlarge the sheriff's levy, as returned. It only says, however, that the land and appurtenances levied on are not sufficient to pay the debts and costs within seven years beyond all reprises. These words may be well satisfied, consistently with the plain meaning of the return. The sheriff cannot possibly sell more land than he has levied on, and should the jury be of opinion with the plaintiff on the true meaning of the contracting parties to the deed, their verdict ought to be confined to one undivided fourth part of the forge.

The jury staid out all night, and on the next morning returned a verdict for the plaintiff for one undivided fourth part of Tough Forge, and for the defendants as to the residue of the lands.

Messrs. J. Woods, Campbell, Meason and Morrison, *pro quer.*
Messrs. Ross, Addison, Lyon and Kennedy, *pro def.*

ELSON, a negro, *against* WILLIAM M'COLLOCH.

Only the owner, or his lawful attorney can register a negro or mulatto. The act of a stranger in such case is merely void.

HOMINE replegiando. The only question in this case was, whether a stranger might register a negro, under the act for the gradual abolition of slavery, passed the 1st March 1780?

The court declared, that the point would not bear dispute. The words of the 5th section of the act were imperious. 1 Dall. St. Laws, 840. "The owner or his lawful attorney, shall deliver, or cause to be delivered in writing," &c. No one therefore, except the party legally or equitably entitled to the negro, or mulatto, or a person legally authorized for that purpose, can lawfully register him; and the act of a stranger in such particular, is merely void.

It was agreed that a verdict should be entered for the plaintiff for nominal damages only, he having been in the defendant's service but two months, and full costs.

Mr. J. Ross, *pro quer.*

Messrs. Addison and Meason, *pro def.*

DECEMBER TERM 1804.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKEN-
RIDGE, JUSTICES.

JAMES BROWN *against* GIRARD.

Protest of a master of a ship, evidence on a policy of insurance.

A warrant and survey in the admiralty, good evidence.

A vessel insured must in all respects be fit for the trade wherein she is employed, and the *onus probandi* of sea worthiness, generally lies on the insured: but where the loss is fairly attributable to sea damage, or any other unforeseen misfortune, the proof lies on the insurer who sets it up as a defence.

This cause came on again to trial, a new trial having been ordered at the last December term.

The suit was brought on two policies of insurance; the one on goods laden on board the schooner Eagle, at and from Edenton in North Carolina to Cape Nickola Mole; the other on the schooner herself, during the voyage.

The plaintiff offered in evidence, the protest of Orlando Dane, the master of the schooner, taken in Philadelphia on the 12th June 1797, ten days after the subscription of the two policies, tending to show that the vessel was forced by winds and weather into this port.

The defendant's counsel objected thereto. We rest our defence on the deviation of the captain: instead of proceeding to Cape Nichola Mole, according to the terms of the policy, he came to the port of Philadelphia, and seeks by his own oath to excuse himself, under the pretence of a storm. If there be a recovery against the underwriter, the plaintiff cannot maintain a suit against the master; so that, in fact, the latter gives evidence in his own cause. The master is answerable for all negligences and irregularities, on the soundest principles of reason. Wesk. 179. He must proceed to the place of his destination without delay. Abbot 193, 4. Nothing can be more clear, than that the underwriters are discharged from all responsibility, whenever a deviation takes place. Park 335, 1st, ed. The justification to the insured for leaving the direct track of the voyage, is founded on necessity and reasonable cause; such as to repair his vessel, to escape from an impending storm, to avoid an enemy, or to meet a convoy. *Ib.* 343. And in cases of deviation, the premium is not to be returned, because the risk has commenced. *Ib.* 362. In a question on a policy on goods, whether the ship was seaworthy or not, the owner of the ship was rejected as a witness, to prove that she was staunch, until released by the plaintiff. Peake Ni. Pri. 84. So in an action against a master, for the negligence of a servant, the latter is not a competent witness to disprove the negligence, without a release. 4 Term Rep. 589. One is not a competent witness to impeach a security which he has given, though he is not interested in the event of the suit. 1 Term Rep. 296.

The protest offered is a mere *ex parte* deposition, wherein the master seeks to justify his own conduct to his employers. Experience teaches us, that we are not to expect rigid virtue in such cases. Even if there had been a cross-examination, the deposition could not be received in evidence, unless by consent or rule of court. The reading of such papers is attended with great danger in mercantile life.

The plaintiff's counsel answered. The paper produced has been improperly styled a deposition; it is an instrument perfectly well known by the common usage of the country, and has always been received as evidence in our courts in questions of a commercial nature. 1 Dall. 6, 10, 318. Strict rules of legal evidence must not be applied to mercantile transactions. 1 Dall. 17. The exception, if established in the present instance, goes to all protests; and thus an instrument of great utility in the commercial world, wisely calculated to prevent collusion, by recording events which have happened on the ocean, immediately on the ships an-

rival in port, will be rendered wholly nugatory and useless. The master is viewed as the common agent of the insurers, as well as the insured, and both parties are equally interested in his protest. To call for a release to the master by the owner, or a cross-examination by the underwriter, is impracticable in most cases; because protests are usually made in foreign ports, in the absence of both parties; and in this particular, they are clearly distinguishable from depositions in the usual course of justice, or witnesses testifying *viva voce*. The practice of the courts of justice of this state in receiving the protests of masters of vessels in evidence, is founded on a presumed necessity, inferred from the nature of commerce. Upon the same ground, a person is allowed to verify by his own oath, his book of original entries, in order to substantiate a demand for goods sold or work done, which is not allowable in Great Britain. Whether mariners usually adhere to the rules of rigid virtue in their protests, can only be determined by the jury under a careful review of the circumstances of each particular case.

By the court. Let the protest be read and be judged of by the jury, agreeably to the uniform practice. We considered this matter very fully, on the motion for the new trial, and adhere to the opinion we then delivered. The usage is founded on the convenience of trade, and is attended with salutary effects. If the defendant's doctrine prevails, few losses will be recovered on policies of insurance.

The protest was then read, wherein the mate and one of the seamen had joined. It appeared thereby that the schooner sailed from Edenton on the 4th June 1797, and struck heavily on Ocracock bar, whereby she sprung a leak which afterwards increased. The captain then bore away, and on the 8th June met a severe gale of wind, which much augmented the leak, and necessitated him to come to Philadelphia, as the next port.

The schooner was afterwards captured on the 4th August by a French privateer and carried into Port de Paix in Hispaniola, and there condemned in the admiralty on the 15th August, on the ground of illicit trade; because Cape Nichola Mole and Port au Prince, were revolted colonies from France and in a state of siege.

The defendant now rested his defence on the want of seaworthiness in the schooner, and offered in evidence a warrant from the District Court of the United States for the district of Pennsylvania, dated 22d June 1797, to two persons, to survey the vessel and make return of her state and condition; and the return made thereon.

This was objected to, on the authority of *Wright v. Barnard*, Park 436, that a return of survey is no evidence to prove the vessel not to have been seaworthy, but merely to show a condemnation thereon.

The defendant's counsel insisted, that they were bound to produce the written document, as the best kind of evidence. It was a judicial proceeding under an act of congress. By the act of 8th May 1792, the clerk of the court was empowered to take the affidavits of the surveyors, relative to their reports. The record only can prove itself.

Per cur. As records, the warrant and survey surely may be read. Their operation will be considered hereafter.

The reports of the surveyors, made on the 24th June, stated, that upon examination, they found the plank of the schooner much worm eaten about [the stem and stern and at the stern post, and that her leaking was occasioned thereby, and not by running on Ocracock bar.

The testimony being closed on both sides, the counsel addressed the jury on the head of the seaworthyness of the schooner; and it was agreed, that if it was established, that she was not seaworthy, the policy on the goods, as well as on the vessel herself, was thereby annulled. Park 249, 263, 1st ed.

The court submitted it as a question of fact to the decision of the jury. They laid down the rule to be, that the vessel insured, must in all respects, be fit for the trade wherein she is employed; and generally, the proof lay on the party insured; but if it appears that the loss may be fairly imputed to sea damage, or any other unforeseen misfortune, and the underwriter means to defend himself on the ground of her not being seaworthy at the time of her departure, the burthen of the proof lies on him who sets it up as a defence. 2 Marsh 367, 8.

The jury found a verdict for the plaintiff for \$836 and 82 cents.

A motion was afterwards made for a new trial, on the ground of the verdict being against evidence; but the court denied the motion.

Mr. Condry, *pro quer.*

Messrs. Ingersell, and Rawle *pro def.*

JOHN BROWNE *against* President and Directors of the Insurance Company of Pennsylvania.

It is no objection against a bankrupt being a witness, that the names of his assignees were not substituted in the action, immediately on his obtaining his certificate of conformity.

Covenant on a policy of insurance, dated 30th January 1795, on the brig Betsey, William Bass, master, from Philadelphia to Bourdeaux, and at and from thence back to Philadelphia, upon all kinds of lawful goods and merchandizes laden or to be laden on board her. "The goods warranted to be lawful, and the brig an America bottom." The defendants subscribed under their common seal \$13,333 and 33 cents, at a premium of 9 per cent.

An amicable action was entered to March term 1800. On the 7th December 1801, the plaintiff obtained his certificate of conformity to the act of bankruptcy. In September term 1804, on motion, the names of his assignees were substituted.

It appeared by the register of the brig, that she was an American bottom, and solely owned by Samuel Penrose, who chartered her on the 26th December 1794, to the plaintiff.

The original invoice and bill of lading showed, that the outward bound cargo belonged to the plaintiff, who consigned the same to Du Bousseau and company, merchants, in Bourdeaux. The return cargo also belonged to him, as appeared by the original documents.

The brig in her voyage from Bourdeaux was captured on the high seas, by the armed vessel, called the Thetis, commanded by Thomas B. Hutchins, a subject of his Britannic majesty, and sent into Bermuda, where she was libelled as enemy's property, on the 4th July 1795. Captain Bass answered the usual interrogatories, and swore, that the vessel was owned by Penrose, and the cargo by the plaintiff; he sailed from Bourdeaux on the 3d May on his return voyage, and was brought to, on the 10th June, by the privateer Experiment Captain Nash, who after examining his papers kept many of his French letters; and that he was afterwards captured on the 15th June by the Thetis, and sent into Bermuda, and that none of the ship's papers were false or colourable. The oaths of Penrose, Browne and his clerk, were also taken, establishing the property of the vessel and cargo as before mentioned.

On the 14th August following, John Green, esquire, the judge of the Vice Admiralty Court of Bermuda, pronounced his interlocutory decree, whereby he declared the vessel to be truly American; but that a letter from Charles Burgeron to John Loupe, found on board, manifestly contradicted the proofs as to the cargo; he gave

sixty days for further proof, and directed the cargo to be appraised, and stipulation given for the amount, which was done accordingly.

Two letters were contained in the admiralty exhibits, said to have been written by Charles Burgeron, who transacted business for Du Busseau and Co., to John Loupe and Company, in Philadelphia. The first dated March 8, 1795, acknowledged the receipt of their three letters. Bass had arrived in the *Betsey*, and they will dispose of the cargo on the best terms; they are sorry he is not naturalized, and cannot carry on trade in his own name; they press him to send a large cargo by himself or friend, and to send provisions; Indian corn was in demand; they would soon write to John Browne. The second was dated the 25th April 1795, wherein it is said, that they have done all they could to make them a good return, and have written to John Browne; they hope that their vessel will be laden with provisions, &c.

On the 14th October 1795, Captain Bass was again examined on interrogatories, and declared that he never heard of Loupe, and Co. until he was brought into Bermuda, and that the cargo really, and in truth, belonged to Browne. John Loupe was also examined, and declared that he was naturalized in America, though born in France; he had recommended Browne to Du Busseau and Co., and that he was in no wise interested in the cargo, which he believed to be the property of Browne; he swore, that he knew no such house as Loupe and Co., and that he had never written the letters referred to in the exhibits. They were corroborated in their testimony, by the oaths of William Pickham and William Lightford.

The judge hereupon decreed the restitution of the cargo, on the 4th December 1795, but declared there was probable cause of seizure. From this sentence, the advocate general appealed, and a stipulation was given to prosecute the appeal.

The cause came on to be heard before the Lords Commissioners of Appeal, in Great Britain, the earl of Chatham, Lord President of the Council, Sir Richard Pepper Arden, master of the rolls, Lord Walsingham and Sir William Wynne, being commissioners; and on the 28th July 1798, they gave their final sentence. They thereby reverse the sentence of the vice admiralty court in Bermuda, and decree, that the cargo is good and lawful prize, belonging to the enemies of Great Britain; affirm that part of the decree, which directs the taxed costs of the captor to be paid by the claimants; and direct a monition to issue to William Bass, and Christian Ewald (the clerk of the plaintiff Browne) claimants, and to James Perot and William Sears, the sureties, to answer the appeal, for the payment of 4539*l.* 17*s.* 4*d.* currency of Bermuda, being the appraised

value of the cargo, within fifteen days after the service of the monition.

To prove an offer to abandon to the officers of the insurance company, the deposition of the plaintiff taken after his certificate of conformity, was produced and objected to.

The defendants' counsel insisted, that the carrying on the suit after the plaintiff's bankruptcy, was voluntary in him until the last September term; or at least, that he acquiesced therein; and he was therefore liable for the intermediate costs until that time. The quantum of interest in a witness, is wholly immaterial. If the assignees chose to proceed in the action without an immediate substitution, the act must be imputed to themselves, and they must submit to the consequences. The court will deem themselves bound by their own record. Trustees appointed by statute, governors and directors of the poor of a certain parish, are not witnesses upon an appeal to the sessions against a rate made by them, though they are entitled to be reimbursed such costs out of the parochial fund; because they are parties to the cause, and liable to the costs in the first instance. 3 East. 7. And Lord Chief justice Ellenborough said, that though persons cloathed with naked trusts, have been admitted as witnesses, no such case can be quoted, where the person was both party to the suit, and liable individually to costs. *Ib.* 13. Here the costs should have been deposited in court before the plaintiff was examined, as was done in *M'Clenachan v. Scott*, in the Common Pleas, in March term 1791. The defendants may well have a double remedy for their costs. And besides these costs may be well deemed a contingent debt.

To this the plaintiff's counsel answered, that the entry on the docket was only evidence, but not conclusive. Such matter obtained in the action of *William Wayne Duncanson*, tried here last September term. The present action was entered at the instance of *Elliston* and *John Perot*, who had an equitable assignment of the policy.

In consequence of a letter written by their counsel to *James Cox*, the president of the insurance company, dated 31st August 1799, the suit was brought on the docket. It was communicated to the plaintiff and he was occasionally applied to for information about facts; but he did not know of the action being brought solely in his own name. He had no control over it, nor could he have discontinued. If a writ of error be brought after a bankruptcy, to reverse a judgment against the bankrupt before, and the judgment be affirmed, the costs of the writ of error refer to the judgment; and the bankrupt's certificate discharges him as to the costs, as well

as with regard to the judgment. 6 T. R. 282. This is much stronger than the present case, and the authority furnishes a full answer to what has been said about the costs being a contingent debt. Our notes do not agree, as to the costs being deposited in *M'Clenachan v. Scott*, previous to the plaintiff's examination; and in *M'Euen v. Gibbs*, in this court, the plaintiff was sworn after his bankruptcy, without depositing any costs. By the 13th section of the act of congress of 4th April 1800 (5 U. S. Laws, 55,) the assignment by the commissioners vests all the debts due to the bankrupt in the assignees, and they may proceed in actions pending in the name of such bankrupt; but the latter can have no interest or benefit therein. The idea of entering two judgments for costs in the same suit, the one against the plaintiff and the other against his assignees, is a perfect novelty in judicial proceedings!

The court said, it was impossible to support the exceptions against the deposition, on the ground of interest. Can the assignees by their own act, in which the unfortunate bankrupt has no participation, and over which he has no control, make him responsible for costs, after he has conformed to the law in all things? The substitution in this case clearly refers to the time of the assignment. The deposition must be read. But how can the plaintiff get over the sentence of the Court of Appeals, which directly falsifies the warranty in the policy, that the goods were lawful?

The counsel for the defendants agreed that the court had put the cause on its true point.

A warranty is inserted in this policy, that the goods shipped on board the *Betsey*, the objects of the insurance, should be lawful. It is a binding condition on the insured, and unless he can show that he has literally fulfilled it, the contract is the same as if it had never existed. Park 363, 1st ed. Here is no ambiguity or doubt, on what ground the decision by the commissioners of appeal in prize cases in Great Britain turned; and the books are filled with authorities, that wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, the courts will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject matter. *Ib.* 417. Among the many cases which may be marshalled on this head, the court are referred to *Bernardi v. Motteux*, *Ib.* 403. *Barzillay v. Lewis*, *Ib.* 410. *Saloucci v. Woodmass*. *Ib.* 413. *Mayne v. Walter*, *Ib.* 414. *Garrels et al. v. Kensington*, 8 Term Rep. 232. *Blackham's case*, 1 Salk. 290. *Jones v. Bow*, Carth. 225. In *Innersly et al. v. Chase*, Park 363, 5th ed., at the cockpit, it is said to be clear from

the time of Lord Holt down to the present period, that the decision of a Court of Admiralty, on the ground of property, is binding on all persons in all cases.

By the court. Whatever our ideas of the final sentence in the court of appeals may be, their decree is conclusively binding upon us. 7 Term Rep. 695, per Lord Ch. Jus. Kenyon. We cannot avoid saying, that we were astonished at the decision in the *dernier resort*; but we are bound to decide according to settled and established rules. The peace of civilized nations demands of us, that we should give full credit to the judgments of foreign courts, having competent jurisdiction over the subject matter, and are compelled in this instance to decide against our individual feelings as men. It appears to us, sitting as judges, that the warranty in the policy is falsified by the sentence of condemnation, that the cargo insured was good and lawful prize, belonging to the enemies of Great Britain, and that the plaintiff cannot legally recover thereupon.

The plaintiff's counsel observed, they could not proceed further. they would take a bill of exceptions, in order to settle the legal question finally in the High Court of Errors and Appeals.

Court. Be it so; we will readily seal the bill. We think the case a very hard one; but we come to decide the matter, "bound and shackled by certain rules from which we dare not depart." *Ibid.*

Verdict for the defendants.

Messrs. E. Tilghman and Rawle, *pro quer.*

Messrs. Ingersoll and Lewis, *pro def.*

JOHN BROOME *against* TIMOTHY HURST.

Special bail may take up principal when attending court, or at any time he pleases.

MR. INGERSOLL moved that the defendant should be discharged from custody. He had attended this court as a suitor, in an ejectment brought by him against Christiana Somerville, and on the trial had suffered a nonsuit. On the morning following, he was taken by his special bail in this cause, as he was setting off in the stage, on his return to New York. The Circuit Court of the United States for this district, had determined in this very case, at their last sessions in October 1804, upon a full consideration of all the authorities, that a suitor while attending his cause in court, would

not be legally taken upon a *ca. sa.*?* He trusted that this court would be governed by the same liberal principle.

This motion was opposed by Mr. Hallowell, of counsel with the special bail.

It is yet uncertain how far this court will accede to the principle adopted by the Circuit Court of the United States. But the two cases are widely different.

The law is clearly settled, that when a party is bailed, the bail have a right to go into the house of the principal, as much as he

* I am indebted to John Wallace Esq. for the following note of *Broome v. Hurst*, as determined by Judges Washington and Peters, in October sessions 1804.

Timothy Hurst, while attending as a suitor in one cause, and a witness in another, was arrested upon a *ca. sa.* issued from the Supreme Court of Pennsylvania.

Mr. Ingersoll now moved for his discharge, and contended that the exemption of parties, witnesses and jurors from arrest, extended to judicial as well as mesne process. The reason of the privilege shows its extent. It is a privilege given to all courts of protecting parties, witnesses and jurors, that justice may not be defeated, or the proceedings of the court obstructed. It is necessary therefor, that it extend to judicial, as well as to mesne process. The privilege of members of parliament, of ambassadors' servants, of members of the King's family, of attornies, of jurors, of witnesses, &c., are all analogous, and founded on a similar reason. He cited the following authorities: An attorney arrested on a *ca. sa.* while attending the execution of a writ of inquiry, was discharged. Barnes's Notes 200, new ed. Privilege of parliament extends to executions. 5 Bac. Abr. 681, 687, new ed. A member of the King's family discharged from a *ca. sa.* 6 T. R. 686. Ambassador's servant discharged from arrest on execution under stat. 7 Anne c. 12. which is but declaratory of the common law. 2 Lord Raym. 1524. 3 Stra. 797. The privilege extends to cases of execution. Dyer 60, new ed.

In the books the rule is laid down generally, that suitors, witnesses, &c., are privileged from arrest *cundo et redcundo*. Now the word arrest, in strict legal language, applies to taking on execution, as well as on mesne process, though in common parlance we may generally confine it to the latter.

It is true, it was decided otherwise in the case of *Starret*. 1 Dall. 356. But that was at Nisi Prius, and without much argument, and appears to have been ruled on the authority of Wood's Inst. 576. But Wood, though he lays down the law to be so, cites 8 Inst. 341. 1 Lev. 159, and one Vent. 11, neither of which books support the distinction of the privilege extending to mesne and not to judicial process. The law in Pennsylvania has never been considered as settled by *Starret's* case, and the opinion of many of the bar has been the other way. 3 Dall. 479.

Mr. Rawle for the plaintiff *contra*, cited *Starret's* case, 1 Dall. 356. Wood's Inst. 576. Bro. Privilege, pl. 159. 5 Com. Dig. 89, new ed. See also Comy. 411. 3 Salk. 46. 2 Tri. per pais 382. Crompt. Just. 162, b. 181, a. Dig. of adjudged cases 110. 1 Bulst. 85.

By the Court. It is clear from the cases cited, that the applicant was privileged from arrest by virtue of the *ca. sa.*, and that it is our duty to discharge him, that the proceedings of this court may not be impeded, or justice defeated.

has himself; they have a right to be constantly with him, and to enter when they please to take him. 2 H. Bla. 122. The liberty of the principal depends on the permission and indulgence of the bail, who may take him up at any time, even on Sunday. 1 Atky. 239. The same law is laid down by Lord Kenyon in 5 Term Rep. 210. Bail may take up a bankrupt going to his examination, or one going to a court of justice. 1 Sell. Pract. 170.

By the court. There is an evident marked distinction between the arrests of ministerial officers, and the acts of the bail in taking up the principal. It has been quaintly said, that the bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge. 6 Mod. 231.

Motion denied:

RESPUBLICA *against* JOHN DAVISON.

The jurisdiction of the admiralty is confined to offences on the high sea. Where a witness swears directly to an offence committed by another, the court will not discharge the party absolutely, but admit him to bail.

Habeas corpus cum causa, under the act of 1785, issued to the keeper of the criminal department, to bring up the body of the defendant. It appeared by the return thereon that he was committed to gaol by Abraham Shoemaker, esq., one of the aldermen of the city, for having willfully set fire to a vessel of which he was owner, called the Theodosia, with the intent to defraud and cheat the Phœnix Insurance Company, out of the insurance made on her, upon the oath of David Bowers.

The defendant on the 11th June 1804, effected an insurance of \$1000 for three months with the Insurance Company, on a valued policy of \$1800; and the aforesaid David Bowers, who was the captain, on the 2d August following, made a protest, whereby he swore, that on the 31st July the vessel was burnt either by lightning, or the candle in the binnacle, on her voyage to Sinepuxent, at a place called Mahon's Ditch, in Delaware river, five miles below Duck Creek, and the same facts were verified by the oath of William Riddle, a seaman. These papers were presented to the Phœnix Insurance Company, and \$900 were paid by them to Davison.

Two days before the hearing on the *heabus corpus*, Bowers made oath, that he sailed in ballast from Philadelphia on the 23d July; that his owner, Davison, proposed to him to sink or burn the vessel in the Delaware, and in consequence thereof she was afterwards burnt in the Delaware, at Mahon's Ditch, on the 31st July. There was no thunder or lightning at the time. One Farmer Fleetwood, a seaman, assisted in the burning.

Mr. J. Sergeant now moved that the prisoner should be discharged, or at least admitted to bail.

He proved by the ship carpenter, that the sloop had been put into complete repair before she sailed, and must have cost Davison \$1200, or 1300. He had advised the making of the insurance, and thought Bowers incapable of navigating her.

Another witness proved, that the sloop lay at anchor in Mahon's Ditch, when she met with the accident, and that it was 50 or 60 feet in width.

No reliance can be placed on the testimony of Bowers. He has sworn differently at different times; he is contradicted in what he has last sworn, by the oaths of all the persons on board. He is under the influence of the most deadly revenge, having quarrelled with his owner, for refusing to him what he had no pretensions to demand.

This case does not fall within the act of congress of last session, passed 26th March 1804, 7 U. S. Laws. 126. The 2d section thereof confines the offence of the owner of the vessel, in willfully and corruptly destroying the same, with intent to prejudice the underwriters, to acts done on the high seas.

The Admiralty Court in England has cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county. 4 Bla. Com. 268. Wood's Inst. 575, 6th ed. 2 Bac. 628. What shall be said to be the high sea, does not appear to be precisely settled by the English books.

It has been determined to be no part of the sea, where one may see what is done of the one part of the water, and of the other; as to see from one land to the other. 3 Inst. 140, 141. 12 Co. 80. Moor. 892. But it is also laid down, that such place as is covered with salt water is *altum mare*. Owen 123. And by Coke, the Admiralty Court has cognizance of a matter done in ship, riding in a port that is not within the body of a county. 1 Rol. Rep. 250. But no controversy can possibly exist whether Mahon's Ditch can be styled high sea.

The court demanded of Mr. Dallas, the district attorney for the United States, whether he claimed in behalf of the federal courts, jurisdiction over the offence alleged to have been committed by the prisoner. After some consideration, he frankly admitted, they could not claim the jurisdiction.

By the court. However suspicious the testimony of Bowers may be, yet as he has sworn directly to the offence committed by Davison, we cannot discharge him. It is the province of a grand and petit jury alone to determine on his innocence or

guilt. Let the prisoner give bail, himself in \$1000 and two sureties in \$500 each, to answer the alleged fraud at the next Mayor's Court to be held for the city of Philadelphia.

JONATHAN KNIGHT *against* GEORGE WILTBERGER.

Justice of peace has no jurisdiction over an abstract question of right, though the parties agree to enter the action before him. His judgment must be for a sum certain.

Certiorari to Samnel Garrigues, esq., one of the justices of the peace of Philadelphia county.

The return stated it to be an amicable action, entered in the justice's docket, and referred by consent. On the 20th December 1803, the referees reported, that the plaintiff should receive from the defendant, one third part of all the moneys paid for wharfage of all vessels, except river craft coming to the front of either of their wharves, to heave down, or otherwise; judgment *inde*.

Mr. Browne for the defendant, excepted to the record, that the suit had not been brought by due process, for any debt or demand, and that judgment had not been entered for a sum certain.

Mr. Wells, for the plaintiff, urged, that they had mutually agreed to enter the suit, and submit the decision of their several rights to their neighbors, as an abstract question.

Sed per cur. What right had a justice of the peace to entertain a jurisdiction over an abstract question? No law gave it to him, nor could it be delegated to him by consent. The judgment also was radically bad, and must be reversed.

NAOMI DONALDSON *against* JOHN MAGINNIS.

Justice of peace has no jurisdiction in assault and battery for damages under the act of 1st March 1799, revived by the act of 2d January 1804.
Husband must be joined in suits brought for an injury done to the wife.

Certiorari to Ebenezer Ferguson, esq., one of the justices of the peace of Philadelphia county.

It appeared by the return, that a warrant, dated 19th June 1804, had been issued in a plea of damages not exceeding \$20. The complaint was for beating the woman in a violent manner. The parties appeared before the justice: the plaintiff agreed to submit the damages to referees, and chose her man. The defendant refused to make any choice, whereupon the justice chose to others to decide between the parties. He also appointed the time and place of hearing; and the referees having met on the 22d June, proceeded to hear the plaintiff and her witnesses in the absence of the defendant,

awarded to the plaintiff \$19 damages and half of the costs! Judgment *inde*.

Mr. Browne for the defendant, filed the following exceptions to the record: 1st. That the suit was instituted to recover damages for assault and battery, when the justice had no jurisdiction, and it was not cognizable before him. 2d. That the plaintiff was a married woman, when the suit was brought, being the wife of Donaldson, whose name is not mentioned in the process.

By the court. Unquestionably the justice had no jurisdiction. The act of assembly of 1st March 1799, in the 4th section excepts civil actions for damages in personal assault and battery, from the powers of justices of the peace. 4 St. Laws 353. This act which was temporary, was afterwards made perpetual, by a law constitutionally enacted by two thirds of the house of representatives and of the senate, on the 2d January 1804, so that it was in full force when the warrant issued. 6 St. Laws 3,

The last exception, which has been properly verified by affidavit, as a plea in abatement, is also fatal. The husband must be joined in suits brought for injuries done to his wife, by the rules of law. The process was irregular, and being *coram non judice*, the whole is void and must be reversed.

THOMAS PRIOR executor of JOHN WELLS *against* THOMAS KELLY
and DORATHY his wife, administrators of GEORGE COOPER, jun.

Five suits on bonds consolidated into three, on obligations.

FIVE suits were brought, returnable to this term, upon bonds between the same parties.

Mr. Hopkinson for the defendants, obtained a rule to show cause why the four last actions should not be consolidated into one.

Mr. Browne for the plaintiff opposed it, as not being founded in the practice of the court.

The matter was stirred several times. The court having consulted the bar, who differed in their ideas on the subject, at length directed that the four last suits should be consolidated into two, making in the whole three suits.

JAMES HAMILTON *against* JOHN FREDERICK and NATHAN HARVEY,
partners, under the firm of FREDERICK and HARVEY.

Capias issued against two partners, one is taken, and the other returned N. E. I. A general *narr.* is filed against both as on a joint contract, pleas in bar put in, the suit referred and exception taken to the report on its merits, the informality in the declaration is cured.

APPEAL from the Circuit Court of Dauphin county.

It appeared by the record, that a *capias* in case had issued against both defendants, returnable to March term 1803, upon which the sheriff had returned C. C. B. B. as to Frederick, and N. E. I. as to Harvey.

Mr. Fisher appeared for Frederick. The action being removed to the Circuit Court, a jury was sworn therein, November 3d 1803. A juror was afterwards withdrawn by consent, and the matters in variance were referred to three persons, who reported 73l. 0s. 8d. in favor of the plaintiff. Exceptions were filed to the report, which upon a hearing were overruled by Mr. Justice Brackenridge, and judgment entered on the report.

The defendant appealed therefrom.

The plaintiff had filed his declaration on a general *indebitatus assumpsit* for goods sold and delivered, and also on a *quantum valebant*, against both defendants, without taking any notice of the sheriff's return.

Mr. Duncan for the defendants, insisted, that this was a joint contract, and declared upon as such. The declaration is totally defective, in omitting the sheriff's return as to Harvey, and no judgment can be entered against one who has neither been served with process, nor has voluntarily appeared. Barnes 246.

Mr. Hopkins, *pro quer.* It does not appear that any judgment has been entered against Harvey. It is admitted there is an informality in the declaration; but it is contended, that it is cured by the pleas in bar, the report and the exceptions taken thereto on its merits. 1 Dall. 461-2. The plea of payment admits the declaration to be good. 10 Vin. 3 pl. 12.

The utmost that can be said here, is, that the plaintiff has stated his demand in his declaration in a defective manner.

And of this opinion were the court, who directed a confirmation of the judgment in the Circuit Court.

THOMAS HOCKLEY *against* JACOB FULMER, junr.

Summons against two not served as to one, and as to the other who appeared, removed by *hab. cor.* into the Circuit Court; *narr.* against him only who appeared, and pleas in bar put in; the jury were sworn as to both defendants. Held to be aided by the verdict.

APPEAL from the Circuit Court of Dauphin county.

By the record it appeared, that a summons in case had issued against Jacob Fulmer, sen. and Jacob Fulmer, jun., returnable in the Common Pleas, to September term 1802. The return thereon was, summons served as to Fulmer, jun., and N. E. I. as to Fulmer, sen. Mr. Elder appeared for Fulmer, jun., and the cause as to him, was removed by *habeas corpus*, to the Circuit Court.

The plaintiff filed his declaration in general *indebitatus assumpsit* as to Fulmer, jun. only. The defendant pleaded *non assumpsit infra sex annos*, and *non assumpsit* and payment, and the plaintiff replied *non solvit*. The issues being joined, the cause came on to trial at the Circuit Court for Dauphin county, November 3d 1803, before Mr. Justice Brackenridge, when the jury on a full hearing, gave a verdict for the plaintiff for \$405 27.

The following reasons were next day filed in arrest of judgment. 1. For that there has been a mis-trial; inasmuch as the jury were sworn to try a cause never brought into this court. 2. For that the jury were sworn to try a cause between Thomas Hockley, plaintiff, and Jacob Fulmer, sen. and Jacob Fulmer, jun. defendants, and therein rendered their verdict; whereas in truth and in fact, the said Jacob Fulmer, sen. is no party to the record. 3. For that the original summons was issued against Jacob Fulmer, sen. and Jacob Fulmer, jun. That the plaintiff's allegations stated in his declaration, were against Jacob Fulmer, jr., in his individual capacity; that the *habeas corpus* issued against Jacob Fulmer alone; and that the jury were sworn to try a cause between Thomas Hockley, plaintiff, and Jacob Fulmer, sen. and Jacob Fulmer, jun., defendants.

These reasons being overruled on argument, judgment was rendered on the verdict, and the defendant appealed, his counsel certifying the reasons in arrest of judgment, as the grounds of his appeal.

Mr. Dallas, for the defendant. The leanings of the court to support verdicts, where it is supposed substantial justice has been done, are perfectly well known; but we confidently believe, that they have no inclination to go beyond the settled law.

Here there is manifest error. No such suit existed in court as the jury were sworn to decide. Jacob Fulmer, sen. was neither summoned nor appeared to answer the plaintiff's demand. No judgment can be rendered against him, consistently with the first principles of justice. He cannot be condemned unheard.

Another objection, equally fatal to the proceedings, is apparent on the face of the record. The writ issued against Fulmer, sen. and jun. It is the ground work of the suit, on which the superstructure must legally be built. But the declaration rests on a different foundation, and varies from the original process. It states a different contract as if made with Jacob Fulmer, jun. alone. It is settled, that if the matter of abatement be *dehors*, it must be pleaded, but if *intrinsick*, the court will take notice of it themselves. 1 Bac. Ab. 15, (new edit. 17.) The case of Horner v. Moor, cited 5 Bnrr. 2614, is strong in point. Action on a joint bond against one of the obligors only. Defendant pleaded *non est factum*. After verdict for the plaintiff, judgment was arrested, because the defect appeared on the declaration. Vide 1 Crompt. Pract. 300.

Mr. Hopkins, *pro quer*. The feelings of every honest mind will lead to confirm the verdict of a jury, where the merits of a cause have been fully heard and decided upon justly. The strict legal niceties, which formerly disgraced the law, are now almost entirely eradicated. 3 Bl. Com. 410.

The first exception goes to the mere misprision of the clerk; but the introducing the name of Fulmer, sen. to the jury, did not change the nature of the plaintiff's demand. They were to go according to the *allegata* and *probata*. The declaration contained the plaintiff's ground of action, as exhibited to the jury. The court will overlook the mere mistake of the clerk, or a trifling nicety; and there is no need of any actual amendment. 3 Wils. 275. 2 Burr. 1162. After verdict, where defendant's name is inserted in the declaration, instead of the plaintiff's the former will be rejected as surplusage. 3 Wils. 43. Here there was trial by a jury of the proper county; and if the defendant conceived, that the administering of the oath to the jury, making Fulmer sen. a co-defendant, was injurious to him he ought to have objected to it at the time. This is analogous to a party standing by, and seeing a juror sworn, against whom he has good cause of challenge; he shall not allege it afterwards as a ground for a new trial. The judgment rendered, is against the younger Fulmer, and the elder has not been condemned unheard, which is the strength of the exception.

The second objection, which is wholly of a technical nature, and might have prevailed at an earlier stage of the suit, comes at too late an hour. It is settled, that nothing is assignable for error, which might have been pleaded in abatement. 2 Bac. 222, tit. error K. 492, new ed. A variance between the writ and count is certainly pleadable in abatement. There is strong reason in the remark of Lord Kenyon, on the mandamus, between the king and the mayor, &c. of York,

5 T. R. 74, when he said, It is now too late (after a return) to make any objection to the writ itself. The corporation, by making a return to it have precluded themselves from objecting. It is for the convenience of suitors, and of the public, that such objections should be made at the proper season: it ought not be permitted to any party to increase the expenses of litigation by proceeding in the suit, when he himself thinks there is an objection *in limine*, to the proceedings altogether."

The statutes of amendment cure many errors after verdict. The stat. of 16 and 17 Car. 2, c. 8, in particular, cures many defects in matters of substance, not aided by former acts. 1 Bac. 93, 94. The concluding words of the 1st section are very general. "All such omissions, variances and defects, and other matters of the like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, are amendable." 3 Ruff. stat. 293. The variance here is cured by the pleas in bar, and the trial on the merits. 1 Dall. 461, 462.

But it has been strongly contended, that whenever a plaintiff discloses on his own declaration, matter which abates his own action, it is not necessary for the defendant to repeat it in a plea of abatement, but the court are bound *ex officio* to abate the writ: that as the defect appeared on the declaration, he might have demurred thereto, and need not have pleaded at all. 21. And if the objection would have been good on a demurrer, it must prevail in arrest of judgment, since it is not cured by verdict.

These objections, and the cases which gave rise to them, have been fully considered in the King's Bench, in Addison v. Overend, lately, 6 T. R. 766, and it was then resolved, that if one of several owners of a ship, sued alone, without joining the other part owners, advantage could be taken of it by plea in abatement only, even though the defect appeared on the face of the declaration. The court then declared, that it is much more convenient to the suitors, that if the defendant meant to take advantage of such an objection, he should plead it in abatement; and that if there be no such plea, the plaintiff may recover, though it should appear that others ought to have been joined with him. *Ib.* 771. Formerly indeed, especially in cases of contract, it was held, that if it appeared at the trial there was a joint contract, and only one of the contracting parties was sued, it was a decisive objection against the plaintiff's action: but afterwards, for the convenience of the suitors, on considering the principles on which those decisions proceeded, it was held that if a defendant meant to avail himself of such an objection, he must plead in abatement. *Ib.* 770. So

it was determined in *Rice v. Shute* cited be defendant's counsel. 5 Burr. 2611. S. C. 2 Bla. Rep. 695.

The court after advisement, confirmed the judgment of the Circuit Court, on the authority of *Addison v. Overend*. 6 Term Rep, 766. See also 5 Tidd's Pract. 621, 622. *Bradley v. Whorewood*, Cro. El. 204. *Philips v. Wood*. Hob. 251. and *Hamilton v. Frederick* the preceding case.

Certiorari to the Sessions of the Peace of Philadelphia county, to remove all proceedings on a petition to open a street, between the end of New Market street and the beginning of Budd street, in the Northern Liberties of Philadelphia.

The act of 2d April 1804, respecting streets and alleys in the Northern Liberties and Southwark, alters and supplies the act of 6th April 1802; that the same shall not be deemed highways before compensation is made to the owner of the ground.

On inspection of the records, it appeared, that a petition had been presented to the September sessions 1803, praying for the continuation of New Market street, to Budd street, upon which viewers had been appointed. In December sessions following, the viewers reported, that the road prayed for was necessary for the public utility. In March sessions 1804, a review was ordered upon a petition; and in September sessions following, no report having been made on the order of review, the original return was confirmed by the court, who ordered the street to be opened.

Mr. Morgan, who was opposed to the continuation of the street, urged, that there was an obvious distinction between roads laid out in the country, and streets laid out or continued in the city or its environs; in the former instance, allowance had been made by the late proprietors in their grants for the lands, which might probably be occupied by public highways; but not so in the latter. Hence the provisions in the act of 6th April 1802, 5 St. Laws 178, where in the 14th section, it directs how individuals are to be compensated for damages sustained by reason of a public road passing through their land, are unconstitutional, as they militate against the 10th section of the 9th article of the constitution, called the bill of rights. It is thereby declared, that "no man's property shall be taken or applied to public use, without just compensation being made." A pecuniary equivalent should precede the public appropriation; and every statute derogatory to the right of property, or that takes away the estate of a citizen, ought to be construed strictly. 2 Dall. 311, 316.

The section under consideration, instead of giving just compensation for the soil, occupied by the continuation of a street near the city, makes it the duty of the viewers in assessing damages, to take into consideration the advantages arising from the road, and confines the application of the owner of the land for redress, to the period of one year. The 25th section repeals all former road laws. But the act of 6th April 1802, was in fact repealed, so far as it respected any public road, street, lane or alley, within the township of the Northern Liberties, or the district of Southwark, by the supplement thereto, passed on 3d April 1804. 7 St. Laws 507. The proceedings under the former act were not revived by the latter, and consequently the decision in the sessions remained unsupported in September 1804.

Messrs. J. Sergeant and Browne, in support of the street, insisted, that the law of 6th April 1802, was strictly constitutional. The jurisdiction of the sessions attached under this act, and the proceedings under it, continued in full force. This was fully admitted in a late case of a road in Bucks county. The power of the sessions was not taken away by the late act of 3d April 1804, but was modified. That law was merely prospective, and by a fair construction, only related to petitions presented after the passing thereof.

The court were of opinion, that the law of 1804, by its express provisions, altered and supplied the law of 1802, as to the public street within the Northern Liberties, and district of Southwark, and that a compensation must be made to the owner of the ground, before the same shall be deemed highways; but they gave no opinion, whether proceedings in such a case, under the act of 1802, might be carried on under the act of 1804.

The judgment in the sessions was reversed.

Lessee of JACOB BURKHART and HENRY WILLIS *against* ENOST
ROW and JOHN BUCHER.

Though the plaintiff in ejectment cannot compel two defendants having several interests to submit to a joint trial, yet the latter may conclude themselves by a joint appearance and plea.

Where a point has been determined by the Circuit Court, it can only come before the Supreme Court in Bank, upon appeal.

THIS cause was marked for trial at the spring circuit for York county. Mr. Hopkins in behalf of Bucher one of defen-

dants, moved, that he should be separated from the other defendant Row, and that the plaintiff should file a declaration against each defendant, so that the suits might be tried separately. Their freeholds are distinct; they claim under different conveyances; and this strong circumstance attends the case of Bucher, that he has made very valuable improvements on the lands in his possession. The connecting of both defendants in one declaration, was the act of the plaintiff; but he ought to derive no advantage therefrom. It is true, that M. Barber entered his appearance for both defendants in the common pleas, when the declarations were returned served on the defendants in possession. This he did improvidently; but he was not retained by Bucher, nor instructed to appear for him; and his mistake ought not to injure Bucher. Where there are several defendants, to whom the plaintiff delivers declarations in ejectment, who are severally concerned in interest, the court will not permit the plaintiff, on his motion, to join them in one declaration, because each defendant must have a remedy for his costs. *Ranington's Eject.* 73. 2 Keb. 524, 531. *Medicot v. Bruester.*

The motion was opposed by Mr. Duncan, *pro quer.*

The lands claimed by both defendants, are parts of the same original survey, held under the same title by the plaintiff and by the defendants also, though they may have different conveyances from the same person, who was tenant in tail, and sold without suffering a common recovery. If any equitable circumstances have occurred since, which may distinguish their pretensions, they will not be precluded from showing them respectively, on the trial. The application comes too late after a general appearance for both defendants, and joint pleas put in; though the attorney has been ungraciously censured by Bucher for preventing judgment to go against him by default. The nature of costs in this state differs from the practice in England, where each party regularly pays the officers, as they proceed in the suit. But it cannot be pretended, that Bucher would not have a remedy against the lessors of the plaintiff, for his legal costs, if they should fail as to him, and succeed as to Row. Be this as it may. The point now before the court, was decided at the Circuit Court on the 21st April last on argument by Smith and Brackenridge, justices. The court then observed, that the motion should have been made in the common pleas originally. As this was not done, but the defendants have appeared by the same attorney, and pleaded jointly, and in that state it has come up, the suit could not be separated. At the trial, each defendant may take his several defence for the lands in his own possession; and by these means neither of them will be affected by any conduct of

his co-defendant. This decision remains in full force, and unappealed from.

Per curiam. We see no hardship or inconvenience in this case, to which Bucher will be subjected by a joint trial. Though the plaintiff cannot compel defendants severally concerned in interest, to submit to a joint trial, yet the latter may conclude themselves by their own act. Both, or either of the defendants have a remedy for their legal costs, in case of success. However, as the Circuit Court have already given their decision on the point, it can only come regularly before us, on an appeal duly made.

ALEXANDER COCHRAN and EDWARD THURSBY *against* JAMES CUMMINS.

Quere? Whether under a recovery at Nisi Prius in Philadelphia, four days before the term and defendants agreeing that a *testatum* may issue thereon immediately, with a release of errors, such *testatum* tested the first day of the term, and returnable to the next term, is regular and valid against other execution creditors? Third persons, who complain of irregularity in process injurious to them, must apply for redress in due time.

On the last day of the last December term, a rule was obtained to show cause, why a *testatum fieri facias* in this action, tested 14th, December 1801, returnable on the third Monday in March 1802, directed to the sheriff of Northumberland county, should not be set aside

The facts on argument appeared to be these :

The plaintiffs having instituted their suit in the Supreme Court, the same came on to trial at a Court of Nisi Prius in Philadelphia, on the 10th December 1801, when the plaintiffs recovered a verdict for \$2434 and 68 cents. The defendant's counsel pressed the plaintiffs' counsel for another hearing, when his client might have an opportunity of preparing fully for the trial. This was at length agreed to, and the following agreement was drawn up and subscribed in pursuance thereof :

“ I consent, that a *testatum* shall issue to Northumberland county, for the purpose of securing to the plaintiffs what they may eventually recover against the defendant, but no sale to take place till the merits of the cause shall be finally tried. I agree to release any errors or irregularity in issuing the *testatum*.
Mahlon Dickerson
for the defendant. 23d December 1801.”

Thereupon a *testatum fi. fa.* issued, which was delivered to the sheriff of Northumberland county, on the 28th of the same month. Robert Irwin obtained judgment against John and James Cummins, in the Common Pleas of the same county, and issued his execution on the 4th January 1802. The cause was again tried under the agreement on the 8th December 1802, when the plaintiffs recovered against the defendant \$2723 and 77 cents. The defendant's goods were levied on and sold.

Messrs. M. Levy and Duncan in support of the rule.

We contend, that however good and binding the agreement may be, as between the original parties, it is not valid, so far as it respects the interests of third persons not parties thereto. Many cases may be put of this nature. An act may be good between the parties, though fraudulent and void as to creditors. So of marriage brocage bonds ; and unrecorded mortgages as to subsequent mortgages or purchasers ; as in *Levinz v. Will*, 1 Dall. 430. Here has been undue precipitation. The present proceedings cannot be legalized. The first trial was at *Nisi Prius*, on Thursday 10th December 1801. Judgment could only be entered thereon on the first day of the following term, which happened on Monday the 14th of the same month ; a *fi. fa* might then issue, returnable on the first day of the term, viz, January 2d. 1802, and the *testatum* thus grounded, might have then issued tested of that day, returnable on the third Monday in March following. But in the present instance the *testatum* was taken out ten days too soon.

No case has been determined, that on a trial at a preceding *Nisi Prius* court, or during the term, a judgment may be entered thereon, and an execution tested the first day of the term, may be made returnable on the last day of the same term. The original jurisdiction given to the Supreme Court, within the city and county of Philadelphia by the law of 25th September 1786, 2 St. Laws 472, is limited in its effects, and local in its nature. A *fi. fa.* must be filed, and a term intervene before a *testatum* can issue. 1 Dall. 330. But here no *fi. fa.* could legally be filed ; there was not a sufficient interval of time. Fictions of law only hold in respect of the ends and purposes for which they were invented. Where they are urged to an intent, not within the reason and policy of the fiction, the other party may show the truth. 3 Burr. 1243. Equity subsists in legal fiction, but fictions shall not work an injury to innocent persons.

Nothing is better settled, than that consent cannot give jurisdiction. Will it be asserted, that consent could authorize the sale of lands on a *ca. sa.* or on a writ of *retorno habendo* ? Could it justify a sale by a ministerial officer without a judgment ? Such acts of a defendant's mind, grossly violating all legal principles, would be empty shadows of no avail. The law is adapted to the common interests of society, and cannot be bent by the wayward caprices of interested individuals. Of this a strong instance occurs in a late book of Reports. It was solemnly resolved, that a defendant cannot be taken in execution twice on the same judgment ; though he was discharged the first time by the plaintiffs' consent, on an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms

agreed upon. 2 East 248. If it be objected that the court should not interpose their summary powers, because Irwin has a remedy against the sheriff in the ordinary course of proceeding, we answer the remark by denying that he has any remedy while the *testatum* remains in full force, unless it was merely void in itself. And if it be further objected that we come too late, we say our knowledge of the circumstances of the case was but of a recent date, and it does not appear when Irwin knew of the sale of the goods levied on.

Mr. Ingersoll, in opposition to the rule, observed, that a strong sense of justice in the plaintiffs had been tortured into an instrument of oppression. He would not enter into a formal discussion how far the proceedings were regular as to strangers, for as to the parties, it had been admitted, they were legally binding. Thus much, however might be said. To effectuate the fair agreement of the counsel, every thing would be supposed to be done that could be done. On the first trial at Nisi Prius, an immediate judgment might be entered, and a *fiery facias* issued, returnable on the first return day of the next term, viz. 14th December 1801. Consent might authorize such a measure, for Irwin had no vested right when the *testatum* issued ; and thus every step would be strictly regular. The defendant might have made a good bill of sale to the plaintiffs to secure them in their demand, so far as the value of those goods went. And why might he not secure them in the way he has done? The utmost that has been alleged is that the *testatum* was taken out eight or ten days too soon. An original may be filed, returnable to the last return day of the term, to ground a *testatum*. 2 Dall. 269. But a previous point presented itself to the consideration of the court. Has Robert Irwin, even if injured, made his application for redress in due time? His execution against John and James Cummins, issued on the 4th January 1802, and most probably was soon after put into the sheriff's hands. He would there naturally be informed of the now plaintiffs prior execution ; but at any rate, the issuing of his execution would put him on his inquiry, and this was equivalent to notice. The party who complains of irregularity in others ought himself to be strictly correct, and afford no ground for the charges of negligence or remissness. Here Irwin instead of making a prompt application to the summary powers of the court, suffers nearly two years to elapse before he takes any active step in the business, viz. from the 4th January 1802, to the 31st December 1803.

The court gave no opinion as to the regularity of the *testatum*

feri facias, but were fully satisfied that the application came too late.

Rule discharged.

ISAAC PESOA, sen., *against* THOMAS PASSMORE.

A *ca. sa.*, may be served on a bankrupt after the commissioners have signed his certificate of discharge, and before it is allowed by the district judge.

Sur case stated. A commission of bankruptcy issued against the defendant, and he was thereupon declared bankrupt, and on the 20th June 1803, he surrendered, *prout* certificate of commissioners.

After the forty-second day, which was the 27th July 1803, the commissioners granted further opportunities to the creditors and assignees, to examine the bankrupt from time to time, until the 20th September following; *prout* certificate of Bird Wilson, the secretary. At the last examination the commissioners signed the certificate of discharge, and on the 23d December 1803, the district judge allowed the certificate, the commissioners having certified on the 24th November preceding, that the requisite number of creditors had given their consent.

A *ca. sa.* issued at the suit of the plaintiff, by which the defendant was taken into custody, on the 12th November 1803. And it is submitted to the court on the preceding statement, whether, on the said 12th November, the defendant was exonerated from arrest by the plaintiff, and the execution and arrest thereon irregular by law, or regular.

Mr. Philips for the plaintiff, admitted, that under the 22d section of the act of congress, passed 4th April 1800, a bankrupt was privileged from arrest for forty-two days, and such further time as might be allowed for his final examination. But here his privilege ends, until the district judge allows his certificate. The enlarged time ended on the 20th September, but though his certificate of discharge was subscribed by the commissioners, it did not receive the allowance of the judge until three months had elapsed. What was a creditor to do in such a case while matters remained in suspense? No law forbade his remedy against the person of his debtor, and the present proceeding was regular. The law of the Union pursues the British statutes in the present particular. The protection to a bankrupt does not extend beyond the enlarged time. 1 Atky. 148. An execution taken out after the creditors had signed, but before the Lord Chancellor had allowed the certificate, was held good. 1 Term Rep. 361.

Mr. Ingersoll for the defendant, contended, that the construc-

tion insisted upon would defeat the act of congress, and be injurious to the creditors as well as the bankrupt. The 22d section of the act has been already mentioned. The 33d section directs, that he shall at all times after his surrender, attend the assignees, upon reasonable written notice. The 34th section allows him certain sums upon the net produce of his estate, discharge him from all former debts, and exempts him from arrests for such debts. And the 60th section authorizes the commissioners to liberate a person becoming bankrupt, who shall be in prison, in case his conduct shall have been fair, so as to entitle him to a certificate in their opinion, &c. Whenever the bankrupt has submitted himself to be examined, and has assigned his property, he shall not be arrested or detained in prison. This is agreeable to the spirit of our state constitution. To effectuate the intentions of the legislature, a reasonable time must be allowed for procuring the *fiat* of the judge to the certificate of conformity given by the commissioners. It cannot in the nature of the thing be done immediately. The judge, to prevent surprize, will take time to consider. In the case cited from 1 T. R. 361, a distinction was taken between an execution against the goods and person of the bankrupt.

Shippen, C. J., gave no opinion on the case, not having been present during the argument.

Yeates, J. The single question is, whether at the time of serving the *ca. sg.*, on the 12th November 1803, the defendant was legally exonerated from the plaintiff's demand?

It was admitted by the counsel, that the requisite number of creditors had then signed his certificate, but that it was not allowed by the district judge for near six weeks after, to-wit: December 23d.

It appears by the act of congress, the British statutes, and the resolutions under them, that the act of the judge or chancellor is indispensably necessary to effect the discharge of a bankrupt from the debts due by him before his bankruptcy. By the law of the United States, a bankrupt is privileged from arrest for forty-two days, and for such further time as the commissioners may allow; and by section 60, the commissioners may discharge the party from a previous execution, under existing circumstances. If it was the national will, that no bankrupt, after he has submitted to be examined, should be arrested thereafter, until a reasonable time had elapsed for the judge's signature, after the previous ceremonies have been gone through, would not this intention be expressed in the body of the act itself? Would the minutiae of privilege and discharge be gone into

in so many important particulars, and this point be left open for conjecture and implication? In Great Britain, the protection to the bankrupt does not extend beyond the enlarged time by the commissioners. 1 Atky. 148.

We are told by Lord Mansfield, that many years may intervene between the signing by the creditors, and the allowance of the certificate. 2 Burr. 718. Who are empowered by law to fix the reasonable time contended for by the defendant's counsel, during which the creditors are not premitted to arrest the party, who has been examined? What known settled standard is there for deciding on such reasonable period? A creditor who has determined not to prove his debt under the commission, is not obliged to wait for the fiat of the judge; and unless he is restrained by clear words from pursuing his remedy in the ordinary course of law, he may take any legal steps for the recovery of his demand. It is true, upon the allowance of the certificate, the bankrupt will be discharged from custody; but until that period, it is uncertain whether such certificate will receive the sanction of the judge or not.

Urged by these considerations, I am obliged to declare my opinion, that at the time of serving the *ca. sa.* in the present instance, the defendant was not legally exonerated from the plaintiff's demand, and that judgment be entered for the plaintiff.

Smith, J. I feel myself bound to accede to the opinion which has been delivered, for the reasons which have been given, though I wished it to be otherwise. The defendant has precluded himself by giving his bond with security, on his discharge from custody. If he had waited for the allowance of his certificate by the judge, he would have been furnished with an adequate remedy. I think the plaintiff has taken an undue advantage of the defendant; but as I cannot say it is illegal, the latter can receive no relief from us.

Brackenridge, J. I am of opinion, that the bankrupt has his privilege after examination *eundo and redeundo*. The certificate of discharge takes effect from the time of its being signed by the commissioners; and the arrest afterwards, was in my idea illegal.

Judgment for the plaintiff.

**Lessee of HENRY HILL *against* WILLIAM WEST, PETER THOMPSON and
NICHOLAS YOUNG.**

Lessee of HANNAH MOORE *against* Same Defendants.

By a general deed made in 1704, by first purchasers of 5000 acres, with the appurtenances, city lots incident thereto, though previously surveyed, will pass together with liberty lands, unless a contrary intention can be shown.

EJECTMENT for two lots of ground, in the city of Philadelphia. The causes came on to trial at Nisi Prius, on the 28th August 1804, when it was agreed, that a juror should be withdrawn, and the following case be submitted to the opinion of the court.

Richard Pearce, James Craven, Thomas Pearce, Thomas Phelps, and Samuel Taverner, were original purchasers of 5000 acres, from the proprietary, William Penn, and entitled in right of such purchase to liberty land and city lots.

On the 17th of 5th mo. 1683, four warrants issued to survey the city lots in the names of Richard Pearce, Thomas Peace, Thomas Phelps, and Samuel Taverner all of Limerick in Ireland.

On the 1st of 12th mo. 1685, four surveys were made thereof; which on the 12th of 7th mo. 1688, were returned into the office of the Surveyor General, one to each of them, as joint purchasers.

Richard Pearce died, and Thomas Pearce became intitled to his tract of 1000 acres, as his son and heir at law.

On the 18th July 1699 a warrant issued to survey the liberty land, in the mane of Thomas Pearce, and others.

On the 11th August 1699, a survey was made thereof, and on the 26th February 1700, a patent of confirmation issued to Thomas Pearce and others, for 108 acres of liberty land, reciting the original purchase.

On the 24th August 1704, John Phelps, son and heir of Thomas Phelps, Samuel Taverner Thomas Pearce, son and heir of Richard Pearce, granted and conveyed their 4000 acres of the land to James Shattick and Edward Lane, by the following description, to wit: " 5000 acres of land, situate, lying, and being in the province of Pennsylvania aforesaid, with their and every of their appurtenances, in manner following, to wit: the said John Phelps 1000 acres; the said Samuel Taverner 1000 acres more; the said Thomas Pearce 2000 acres more; and the said James Craven 1000 acres more, residue of the said 5000 acres, which said 5000 acres of land were heretofore granted and conveyed to the said Thomas Phelps, Samuel Taverner, Richard Pearce, James Craven, and Thomas Pearce, and their heirs, to some or one of them, by William Penn, esq. in and by several deeds and conveyances, and according to the several parts and proportions aforesaid; and also all their and every of their right, title, interest, freehold, inheritance, property,

challenge, claim or demand, whatsoever of them the said John Phelp's Samuel Taverner, Thomas Pearce, and James Craven or either of them, of, in, or to the said 5000 acres of land, and of, in, and to every part, and parcel thereof, with their appurtenances, in as large, ample, and beneficial a manner as they, or any, or either of them, may, can, or might, or ought to have, hold, and enjoy the same premises, or any part thereof, together with all deeds, evidences, and writings," &c. &c. The consideration money was 150l.

James Craven did not execute this conveyance; from the stamps on it, the deed appeared to have been executed in Ireland. Four of the original grantors are stated therein to be of the city of Limerick, in Ireland.

On the 16th of 3d mo. 1705, the said James Shattick and Edward Lane, conveyed 20 acres of the liberty land to Josiah Hibbert, in fee.

The question for the opinion of the court, is, whether by the deed of conveyance of the 24th of August 1704, the city lots passed to the grantors? If the court shall be of opinion in the affirmative, judgments shall be entered for the plaintiffs; but if they shall be of opinion in the negative then judgments shall be entered for the defendants.

The case was argued at considerable length, by Messrs. E. Tilghman and Rawle for the plaintiffs, and by Messrs. Ingersoll and Dallas for the defendants.

Arguments for the plaintiffs were classed under three heads.

1. What could Phelps and the other grantors convey? 2. What did they profess, and really intend to convey; 3. Have they used apt words to convey the lots of ground in question?

I: The conditions or concessions agreed upon in England on the 11th July 1681, clearly show what interest vested in the first purchasers, under the five articles first mentioned therein. 1 Dall. St. Laws Append. 6.

The proprietary was to lay out for a large town or city in the proportion of 200 acres for every 10,000 acres purchased, if the place would bear it: and every purchaser was to be entitled to 10 acres in the first great town for every 500 acres purchased, if the place would allow it. A town of any degree of compactness would not be effected by this plan; and it was therefore altered by common consent, to accomplish the object in view. A survey therefore of a large tract of land adjoining the city, was directed by William Penn, shortly after the city laid out, called the Liberties of the city; upon which a survey was made of about 16,500 acres, for the use and benefit of the first adventurers.

[Shippen, C. J. This survey of the liberty lands has been much searched for, but could never be found. The deposition of the former Surveyor General, John Lukens, taken in the case of the lessee of Charles Hurst, against some of the proprietary tenants, which came on to trial about 1773, will throw light on this subject. The liberty lands were bounded by the surveys of the country land, from the river Delaware below, to Delaware above the city, and by the lines of the city.

To these remarks Messrs. E. Tilghman and Lewis, who were counsel in the cause of Hurst, fully agreed.]

Under the new established system, every original purchaser of 500 acres of land became entitled to 490 acres in the country, and either 10 acres of liberty land on the west side of Schuylkill, or 8 acres on the east side, together with a city lot of 3 perches in front, and about 18 perches in depth, making about one-third of an acre; that is to say, from $500\frac{1}{2}$ acres to $498\frac{1}{2}$ acres, as the lot of the purchaser fell on the west, or east side of Schuylkill.

The plaintiffs therefore contend, that the city lot equally with the liberty land form component parts of the original grant, and may in the strictest sense be said to be appurtenant thereto. This appears from William Penn's letter to the society of free traders, in 1 Proud's Hist. 264. He therein tells them, "the city lot is, besides your liberty land, part of your 20,000 acres in the country." It will further appear from almost all the ancient deeds, where the country and liberty land and the city lot have been sold together, and have not been previously disjoined by distinct sales of either.

In a deed from John Hornwell to David Powel, dated 9th April 1716, it is recited, that a city lot became vested in Hornwell, in right of Edward Atkinson's original purchase of 500 acres, and that he had obtained a warrant in right thereof. In a deed from John Wright to Israel Pemberton, dated 29th September 1716, a grant from the proprietaries to William Gibson is recited for 500 acres, and that there doth belong, and of right appertain unto the said 500 acres, a certain lot in the city, and 8 acres of liberty land, which by verdict of the last recited indenture are also vested in the said John Wright, in fee. Another deed of the same date, from Rees Thomas to the same Israel Pemberton, contains the same recitals.

The uniform opinion also of the proprietary commissioners of property, both in ancient and modern times, agree therewith. A patent to Robert King, dated 24th of 12 mo. 1704, for a city lot, was granted in right of an original purchase. A patent to Thomas Mayleight, dated 24th of 11 mo. 1705, recites an ori-

ginal grant to Robert Greenway, of 1500 acres, who granted 500 acres part thereof to Charity Null, who devised the same to the said Mayleight, and that there was formerly a city lot in right of and appurtenant thereto, surveyed, &c. A patent to James Logan, dated 1st October 1716, recites a city lot held in right of Henry Geary's purchase of 500 acres; another lot in right of John Geary's purchase of 500 acres; and a third lot in right of Samuel Noyes's purchase of 500 acres, which have since severally been legally vested in the said James Logan, &c.

A patent to James Steel dated 12th February 1719-20 for a city lot, was granted in right of an original purchase. A patent to Isaac Norris and Charles Norris, dated 29th February 1760, for a city lot, is recited to be in right of Sir John Sweetapple's purchase of 1000 acres.

A great mass of testimony might be adduced on this point; but it is presumed, sufficient has been shown to establish the point contended for, if not to fatigue the patience of the court. Little trouble was requisite to procure the deeds and patents already offered to the court. If the first adventurers had not obtained rights for city lots, and liberty lands, as necessarily incident to and part of their original purchases, the first proprietary would have been justly chargeable with a breach of his conditions; but no instance has occurred, wherein they have not become thus entitled, in proportion to the extent of their first purchases.

(The chief justice remarked, that it was a well known fact, that William Penn, on his first coming over, had bought the scite of the city from the Swedes.)

II. The old grant could not have been a jointenancy, because both Phelps and Pearce released the interests of their fathers. The grantors and each of them, professed to convey all their right and claim in the original purchase of 5000 acres, with the appurtenances, in as large, ample and beneficial a manner, as they or either of them held in the premises. More general and comprehensive words could not have been used indicative of their intention to dispose of the whole purchase. The word appurtenances as applied thereto, had an extensive settled meaning, and was not thrown in at random. Whatever is contained in the recital is granted, unless there is an exception. If one grant all his lands in D. containing 10 acres, whereas they really contain 20 acres, by this grant the whole 20 acres will pass. Shep. Touch. 96, (100) cites Dyer 80. A deed shall be construed most strongly against the grantors. 1 H. Bla. 25, 27. The case goes on the ground of description. Equity does not regard the form of the conveyance, but the substance, the money paid and the intention of the parties. Stra. 602.

It is admitted, that the grantors knew their rights, and that the location of the city lots was fixed by the return of survey, 18 years before the date of the deed, under which the plaintiffs claim; but it is contended, that the grantors intended to release their interest therein.

III. It is moreover contended, that apt words have been used for that purpose. That there is a degree of relation between original purchases and city lots, is indisputable. The proprietaries granted no city lot, except to original purchasers. If they may be considered as appurtenant to the first purchase, then they will pass by that term used in the deed. The old grant confers the right. The purchaser buys three things; country land, liberty land, and a city lot or lots, according to the extent of his purchase. The city lot is unlocated, but assignable and transmissible.

Land in a strict legal sense cannot be appurtenant to a messuage or land. Plowd. 170. But it is often taken as occupied, used or lying with or to the messuage. *Ib.* 171. S. C. Dy. 130. A garden may be said to be parcel of a house, and may pass therewith in a grant. 2 Saund. 401. The demise of a house, passes lands occupied therewith. 4 Leon. 183. So of the devise of a house. 2 Rol. Rep. 347. Land may be considered as appurtenant to a house, even in the case of the King, where they have been occupied together a convenient time. Cro. Car. 168. The sense of the term appendant may be seen in 3 Vin. Ab. 1, pl. 2. 2, pl. 7. 8, pl. 13. 4, pl. 22. Jenk. 310, pl. 21. Hetl. 14.

If the premises in question had not been surveyed when the deed of 1704 was executed, no difficulty could have occurred. It will be objected, that this severed the right; but the true idea of severance, is a separation of the estate and interest, as by alienation; not by affixing a floating claim to a precise spot. The great point, on which the decision must turn, is whether the location of the premises by a survey made and returned, severs the right under the original purchase.

It is correctly laid down, that usage is the best mode of expounding an ancient deed. 3 Atky. 577. A decisive instance of this usage, we are so fortunate as to be able to produce, which will satisfy every reasonable mind. On the 29th August 1711, a patent issued from William Penn to Henry James, of Bristol, Taylor wherein is recited, a grant to Edward Verberley, an original purchaser of 530 acres, whereby he became seized in fee thereof with the appurtenances. That he died intestate and the 500 acre descended on his daughters. That on the 6th September 1709, a warrant issued, on which there was surveyed t

the daughters, (naming them,) as appurtenant to the said 500 acres, a lot of ground in the city of Philadelphia, bounded, &c. That the said daughters by indentures of lease and release, dated 15th and 16th December 1709, did grant and convey the said 500 acres, with the appurtenances to Henry James, of Bristol, Taylor, in fee, and the said Henry James, by S. C. his attorney, requesting me, that I would confirm the said lot of land to him by patent, I have, &c. This unequivocally proves a recognition of the usage by the proprietary officers, that a city lot would pass by the general term appurtenances in a deed for the 500 acres, though the city lot had been surveyed.

The incident, accessory, appendant and regardant, shall in most cases pass by the grant of the principal, without the words with the appurtenances; but not *à converso*, for the principal doth not pass by the grant of the incident, &c. *Accessorium non ducit, sed sequitur suum principale*. Shep. Touch. 86, (89.)

No line of discrimination can be drawn between a city lot and liberty land, which will meet the present question. Here a patent issued for the liberty land in 1700. Under the deed of 1704, Shattick and Lane sold to Hilbert 20 acres thereof, as is stated in the case. And the intention of the grantors to dispose of all their interest in the original purchase, is strongly evidenced by this circumstance, that neither they nor their heirs have ever claimed the lots in question, nor sold them to any other person.

It has been the uniform practice to grant city lots to the descendants of the first purchasers, or their grantees; and such is the language of the legislature, in their act of 10th April 1781, § 4. 1 St. Laws, 896.

On the 20th July 1781, in pursuance of this law, Samuel Preston Moore, Henry Hill and Richard Wells, the heirs of Richard Hill, who deduced his title under the deed of 1704, filed their claim to the city lots, with the Supreme Executive Council. In 1782, the surveyor general made his report thereon, and in 1785, the Executive Council made their decision.

The defendants' counsel observed, that the contending parties claimed under the same original title.

On the 28th January 1785, Nicholas Young applied also by memorial to the Supreme Executive Council for the lots in question; referring therein to a former memorial, made on the 29th April 1782, and stating that the heirs of Richard Hill claimed the same under the general words of an old deed from the first purchasers. On the 28th February 1788, this claim was referred to the Board of Property, upon a third application by Young to council, made on the 20th of the same month. On the 2d September 1789, Young filed

a fourth memorial with the Executive Council, who on the 16th December 1780, referred the same to the land officers to report thereon. The council afterwards referred it to Mr. Ingersoll, the then attorney general, who having been previously retained as counsel for Young, declined giving any official opinion. Thereupon the present ejectments were brought.

The defendants counsel contended, that the true construction of the deed of 1704, could only be collected from the face of the instrument itself, abstracted from all extraneous circumstances; and that no usage existed in the present instance, which could control this construction.

To give permanence to property, it is essentially necessary that the adjudged meaning of words, should be steadily adhered to. It will not conduce to elucidate the points in dispute, by considering the effect which the generality of the words of this deed would have produced, if executed prior to the survey of the city lots; because the parties then held under the primitive grant. In 1683, warrants are obtained for the city lots. The personal contract of William Penn is thereby abandoned; and in 1688, the lots are severed by the returns of actual surveys from the original right of purchase. The warrants and surveys confer independent rights, and are equivalent to patents, for the purposes of commencing ejectments. These warrants moreover issued in the joint names of the two Pearces, Pehlips and Taverner, and in their joint character. By the returns of survey into the surveyor general's office, these city lots are separated and divided from the old right.

Notwithstanding what has been urged, it is obvious that there is this striking difference between liberty land, and city lots. The former is certainly a component part of the first purchase; and 8 or 10 acres, as has been already mentioned of liberty land, are deducted from each 500 acres of country land; and so of larger quantities in the same proportion. By a conveyance therefore of the original purchase of 500 or 5000 acres, the liberty land which constitutes a part thereof, must necessarily pass thereby. But the city lots are incident, not appurtenant to the primitive grant, and form no component part thereof. They are a kind of gratuity to the first adventurers, an addition to the lands already granted. They might therefore survey all, or any of the three species of property, country and liberty land and city lots, as they thought proper, and convey them according to their respective locations, in the same manner as if they had never been united in one grant. And of course, they might relinquish such part, as they did not choose to survey. The terms *appurtenant* or *appendant*, are not used in the concessions of July 1681.

The lots are here severally surveyed and returned, one to each of the joint purchasers.

That the city lots were not granted *eo nomine* by the conveyance of 1704, cannot be denied; that the parties, at the time of the execution thereof, were conscious of the extent of their rights, is admitted. The consideration expressed in the deed was but 150*l*. A patent had issued for 108 acres of liberty land. Would the sum paid, be an adequate and fair consideration for the whole, including the city lots? Whence then are we to infer, that it was the intention of the grantors to transfer all their interest? It will be remembered, that the deed was drawn and executed in Ireland, and must therefore be construed according to the sense of the words as used in that kingdom at the time, and not in the extended sense, in which it is contended it bears as to the point in question, in Pennsylvania.

It is said, there is a peculiarity of phrase indicative of intention; but the phraseology goes no further than we might reasonably expect from a skillful conveyancer in a deed for the 5000 acres. All the words clearly refer thereto, or to its component parts; not to the city lots which were no parcel thereof. The expressions with the appurtenances, in as large, ample and beneficial a manner as the grantors or either of them held the premises, are to be found in almost every formal deed. The term appurtenances is somewhere called by Lord Mansfield the dragnet of all conveyances.

In common speech, appurtenant signifies something appertaining or belonging to. In a legal sense, land cannot be said to be appurtenant to a messuage or land. So is the resolution already cited from Plowd. 170. 2 Vin. 596. 1 Com. Dig. 376 (573, new ed.) Appendants are ever by prescription, but not so of appurtenants. Both however must agree in quality and nature to the thing, whereunto it is appendant or appurtenant. Co. Lit. 121. b. The surrender of a messuage called Symonds, with the appurtenances, whereto divers copyhold lands were appertaining; nothing passed but the house, with the orchards, yards, &c. Cro. Jac. 526. Grant of a mill with the appurtenances, a kiln used therewith does not pass. 1 Lev. 131. Lands usually occupied with a house will not pass under a devise "of a messuage with appurtenances," unless it clearly appears, that the testator meant to extend the word appurtenances beyond its technical sense. 1 Bos. and Pul. 53. The cases on this subject are fully considered here. One seised of a messuage and two acres of land in C., and of two acres of meadow in K., distant four miles, but used and occupied therewith, devised the said house, with all and singular the appurtenances thereto, or in any manner belonging, to his son in fee: all the court held, that the two acres

of meadow did not pass thereby ; because, by the words *cum pertinentiis*, land passeth not but only such things as may be properly pertaining ; but otherwise it had been if the devise was *cum terris pertinentibus*. Cro Car. 57. Here it is attempted to be established, that city lots considerably distant from the country land, never occupied therewith, but held by separate and distinct titles, shall pass as appurtenant to such land. If a survey of the country lands would separate them from the city lots, the same thing would be effected by a survey of the latter in the first instance ; no other time can be fixed on unless we rely on this period. The warrants and surveys form complete substitutes for the original evidences of title : when these are obtained, the deeds of lease and release obtained by the first purchasers are no longer regarded.

The rules of legal construction are not to be superseded by evidence of a light nature. An usage is set up by our adversaries, but none is stated in the case. We do not agree with Judge Tucker, that there can be no custom or usage in the United States ; but we insist, that plain proof should be given thereof, before the rules of law should be accommodated thereto. There could not have been many instances of sales by first purchasers, or their descendants, prior to 1704 ; and between 1682 and 1704 no usage could have taken place and have reached Ireland, that city lots, when surveyed, would go over to the purchaser, by the magical force of the word appurtenances.

In none of the documents produced by the plaintiffs to establish this pretended usage, do we find the deeds from the first purchasers, but only recitals of them. We have therefore a right to suppose, that when city lots were granted, they were expressly mentioned. We now show to the court that cases of this kind did occur. On the 31st March 1713, Nicholas Moore conveyed to Richard Hill 1410 acres, part of an original purchase of 10,000 acres, composing the manner of Mooreland, with the appurtenances, and the city lots thereunto belonging, &c. This shows also the idea of Richard Hill upon the subject, under whom the plaintiff's claim, that though the word appurtenances was used, it was still necessary to specify the city lots.

On the 20th February 1718, William Betton, of London, an original purchaser of 5000 acres, conveyed the same to Humphrey Murray, with the appurtenances, and the city lots, thereunto belonging to the same Richard Hill. For each of these lots, patents were granted by the Supreme Executive Council to the heirs of Richard Hill, but denied the same to them in the cases before the court, because their pretensions thereto were founded merely on the word appurtenances. In 1682, Benjamin Furley became an original purchaser of 5000 acres. On the

of 4th mo. 1703, he granted 1000 acres, with the appurtenances, to Abraham Dennis and John Lukens in fee; and afterwards in November 1708, by two deeds, he granted the remaining 4000 acres, with the appurtenances, in fee, to Sproul. Notwithstanding all this, in direct opposition to the plaintiffs' doctrine, the heirs of the same Benjamin Furley obtained a warrant, in right of his original purchase of 5000 acres, and as appurtenant thereto, for a valuable city lot on High street, to be held in satisfaction of all he was entitled to under his old right. We may observe also with the plaintiffs, counsel, that a mass of evidence might be brought forward, to show that no usage had obtained on the point of construction which they have contended for.

The patent to Henry James in 1711, is strongly relied on. At most, it is but a solitary instance, and cannot prove a custom, which is *communiter usitata et approbata*. It is subject to the objection, that the releases of the daughters of Verberley have not been shown to the court, except by recitals in the patent, which are not evidence against the defendants, who do not claim under it.

It does not moreover appear thereby, that the city lot was surveyed, anterior to the sale, by the daughters to James. The warrant issued on the 6th September 1709, and the deeds were dated 15th December 1709, and though it is recited to have been surveyed when the patent issued, *non constat*, that it was so surveyed when the daughters executed their releases.

The language of the legislature in the 4th section of the act of 10th April 1781, is, that "claims may be thereafter made upon some of the city lots, by descendants of the original purchasers under William Penn, esq., or purchasers under his successors, or grantees, who have neglected to appropriate and set out the same in severalty, so as to be distinguished from the common lands, appurtenant to the said city."

It has been remarked, that the original purchasers or their heirs, have never claimed the premises in question, nor disposed of them to others, and that this strongly conduces to prove the intention of the grantors to sell all their right and claim by the deed of 1704. But how can this intention be reconciled, with the powerful circumstance of their non-claim from August 1704, until July 1781, a period of nearly seventy-seven years?

The plaintiff's counsel in reply. The pretensions of the plaintiffs are precisely the same in every point of view, as if there had been but one original purchaser. The decision of the Supreme Executive Council can have no possible weight; the sole question is,

whether we have not the legal title to the premises in question.

The deed is *sui generis*. It contains unusual provisions. The court will determine on the face of it, but it will call to their aid cotemporaneous expositions. The first adventurers had unquestionable claim to city lots; they were not *gratuities*, nor ever meant as such; William Penn, however estimable, was not in the habit of making such presents; this appears by his grants of the lots in Water street, and from the public squares. He was confined in the Fleet prison many years. If the city lots passed by the deed to Shattick and Lane, the plaintiff's claims are irresistible. The liberty land, located five years before this conveyance, is still held under it. City lots were never attached to the persons of the original purchasers; they passed by general words, as appurtenant thereto, or adjunct, or as parts of the primitive grants.

The question is then reduced to a single point: are words of special description necessary in a conveyance of an old right, after the city lot is located by a survey? It is not pretended to be so as to liberty land.

Though a city lot is incident to the first purchase, it is not inseparably so. The country land drew with it the city lot, which was subordinate thereto. When an adventurer aliened, he disjoined the country land, and city lot; but while he kept them together, they might with great propriety be deemed the first purchase. If he sold a part of the country land, it never drew with it a proportionable fractional part of the city lot.

The arguments drawn from the patent granted to Henry James, are very strong. It is true, the facts are mere recitals but they are the recitals of the old proprietary, which evince his sense of the right, and the practice of his Land Office.

In every patent for a city lot, the deeds of lease and release to the first purchasers are recited. The title and estate continue as before and no warrant and survey can vest him with a different title or estate. A survey reduces a floating right into possessions, by identifying and fixing its situation; it gives locality and stability to the primitive interest, but does not alter the nature of the freehold. The object of the grantors in their deed of 1704, was not to destroy the connection between parent and child, but to argument its force; and no man's act shall be carried beyond his intention, according to the case cited already in the discussion of these causes.

It is farther apprehended, that an unfavorable decision of this case against the plaintiffs would unsettle many titles to lots in the improved parts of the city, and be productive of the most injurious consequences.

The court continued the matter under advisement a few days, and then delivered the following opinions.

Shippen, C. J. The question in this case arises on the construction of the deed of 1704, from John Phelps and others, first purchasers of 5000 acres, to Shattick and Lane, whether a city lot annexed to that purchase, which had been laid out and surveyed six years prior to the date of the deed, did or did not pass to the grantees?

The city lots are not expressly mentioned in the deed to be granted; but it is contended on the part of the plaintiffs, that by general and comprehensive words in the grant of the land, particularly by the words "with their, and every of their appurtenances," the city lots were meant to be granted. And on the part of the defendants, it is contended, and so far very rightly contended, that by the strictly legal effect and extent of the word appurtenances, land cannot be considered appurtenant to land; but many of the authorities that establish this doctrine, do likewise settle, that if it appear to be the intention of the grantors, that lands should pass by these words, they will pass. The case therefore upon this point, resolves itself into a question of intention.

This intention must be chiefly collected from the deed itself; but in such an ancient transaction, it may receive some light from extraneous circumstances, and cotemporaneous expositions.

City lots have been uniformly described in ancient deeds and instruments as being held in right of, and as appurtenant to, the first purchases. The first proprietor himself, and his officers have generally, if not invariably, designated them as such. In one of the patents produced in the course of this argument, that to Henry James, the proprietor expressly describes the city lot as appurtenant to the purchase of 500 acres, and this case of Henry James, is certainly very opposite to the present one, notwithstanding the ingenious objections made to it. Now, when this word has been so generally used and appropriated to this kind of property, when a man grants the land in the ample and unreserved manner that this land is granted, together with every of its appurtenances does not indicate an intention to pass the lots so generally designated as appurtenants?

Again, when the heir of Thomas Pearce grants his right to the original purchase of 5000 acres, with the appurtenances, and every part thereof, (he then resided in Ireland) with all his right and title to the same and every part thereof, in as ample and beneficial a manner, as he can, could or ought to have and hold the same, without making the least exception as to the city lot, could he mean to except it? and what he did not mean to except, after

using such comprehensive words, he must mean to grant. This idea too receives some confirmation, from the grantors having actually made one exception, by the words except as is hereinafter excepted ; which as appears afterwards, is that they should not be subjected to pay the proprietaries quit rents.

Again : it is now 100 years since the deed was executed. We do not know how long the grantors remained living, after the deed was made ; but if they did not mean to sell their whole estate, the city lots as well as the country land, is it not strange, that they should never make a separate grant of these lots to any other person ?

But it is objected, that however the city lots might have been considered as appurtenant to the first purchase, while they remained connected with, and not separated from the 5000 acres, yet after surveys of the lots under warrants from the first proprietor, it could no longer be considered as such ; the actual laying off and surveying the same, causing an entire severance and separation from the 5000 aced, being then not held under the original purchase, but a new and distinct title, namely, the warants and surveys.

The right under which the first purchasers held the liberty land and city lots, was precisely the same, by which they held the county land : it was by the deeds of lease and release, together with the instrument called the consessions made to the purchasers, and to which they were parties, as well as the proprietor. By the first, the 5000 acres were granted generally : by the concessions it was stipulated in what manner the thing granted should be located and laid off, partly in the country and partly in the city and liberties. The whole was one purchase ; the consideration money was paid equally for the liberty land and city lot as the country land. This appears by the patents for the city lots, the proprietor expressly declaring the grant made, to be for, and in consideration, in the indentures of lease and release mentioned ; so that, all together, they were considered as one entire purchase. In this view of the case therefore, it does not seem material which part was first surveyed, the only effect of the survey being to ascertain the several spots they had a right to, under the original purchase.

Upon the whole, I cannot resist the impression, that the grantors in the present case meant by their deed of 1704, to grant all the land they held ; and of course their right to the city lots, as well as the country land. My opinion therefore is, that judgments should be given for the plaintiffs.

Yeates, J. I feel it my duty to declare, that my judgment is not satisfied, that the deed of 24th August 1704, passed the city lots in question, to James Shattick and Edward Lane, the gran-

tees therein named. The terms of the deed, however large and general, or the word appurtenances, under all the circumstances of the case, are not sufficient, in my mind, legally to effect that end; nor has that kind of evidence of the cotemporaneous exposition of such ancient deeds been offered, which satisfies my understanding in that particular.

I freely admit, that the original grantees, under the deeds of lease and release, or their descendants, not claiming the city lots, nor having transferred them to others, besides those under whom the plaintiffs claim, afford thereby a degree of evidence of intention in the parties, as to the premises in controversy: but this of itself, is not of sufficient weight to determine my judgment, to carry the construction of the deed to the extent contended for by the plaintiff's counsel. This opinion however, I pronounce with great diffidence, from my inexperience of the origin of titles to city lots in early times.

Smith, J. The material question in this case is, whether the conveyance of 24th August 1704, transferred together with the 5000 acres, the city lots as appurtenant thereunto.

It is a general rule, that land cannot be appurtenant to land; but this, like almost every other general rule, is subject to exceptions. The clear intention of the parties may take the case out of the general rule. No rule can be general, unless as applied to a subject matter similar in every circumstance.

No case has been cited, where by the law of England, the grantee of an ascertained quantity of land is thereby entitled to a lot in any city. But by the grants from the first proprietors of Pennsylvania, every purchaser of a certain quantity of land in the country, is entitled of right, and as incident thereunto, to a proportioned city lot; and in all recitals of the proprietors respecting such city lots, they are said to be as appurtenant to the country land. It is acknowledged, that if at the conveyance of the country land with the appurtenances, the city lot incident thereto, was not surveyed, it would pass by the general words; but it is contended, that by being surveyed, it is severed, and does not pass without special words descriptive of it; for that the patents granted on the warrants and surveys of the city lots, does not recite the original grant of the land. If so, I cannot hesitate to say, that the city lots will pass after such warrants and surveys, by the same general words, unless it can be clearly collected from all the circumstances that they were excepted.

No additional consideration is paid for the warrant to survey the

city lot. It is granted for the lot, as appurtenant to the land, and recites the grant of the land. In vain therefore is it said, that the patent on the survey of the city lot does not recite the original grant, but only the warrant, when that warrant recites the original grant.

That the parties in interest against the construction contended for on the part of the plaintiffs, must have considered that the city lots did pass, may be inferred; because, for about 80 years they never pretended to claim the same.

The meaning of the word appurtenances, being appropriated by the lord of the soil, and made descriptive of the city lots as incident to the land, it cannot be confined within the trammels of the laws of England.

It seems to me, that the city lot passes of course, by a grant of the lands with the appurtenances; but the presumption that it does so pass, may, like every other presumption, be repelled by evidence, that it was not the intention of the parties.

No circumstance has in this instance been brought to repel the presumption: on the contrary, it is fortified by the acquiescence of the original purchasers, and their heirs; none of whom came forward for 80 years, to claim these lots; from whence it appears, that it was the intention of the parties to the deed of 1704, that the lots should pass with the land.

Brackenridge J. I had prepared a written opinion on this case, which I have mislaid, and cannot recover at present.

The right to the liberty lands and city lots, depends on the same word appurtenances. In the patent to Henry James, the proprietor adopts the word in its full extent. I think I cannot account for the liberty land and city lots, not being specified in this deed: they were not much regarded, but viewed as objects at a great distance. *De minimis non curat lex.*

The term appurtenances in the conveyance under consideration, has a substantial application to the liberty lands and city lots; and the non-claim of the original purchasers, and their descendants for so great a length of time, is a powerful proof of the intention of the grantors, to release all their claim and interest, under the primitive grant.

I am clear without difficulty, that judgment be entered for the plaintiffs.

Judgments *pro quer.*

MARCH TERM, 1805.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

RICHARD TITTERMARY and ROBERT TITTERMARY for the use of their
assignees *against* JOHN GARDINER, junr.

Demurrage on a charter party rests on the default of the freighter or his factor abroad.
The claim of freight is determined by a capture of the vessel and breaking up the
voyage.

COVENANT on a charter party of affreightment, made on the 20th
April 1799. Plea, covenants performed, with leave, &c., and notice
of a set-off.

The charter party was of the schooner John, captain Matthew Ford,
from the port of Philadelphia to Surinam, and back again. The
entire freight stipulated to be paid was \$2920, and for demurrage
beyond 20 days at Surinam, at the rate of \$20 per diem. A special
nota bene was subjoined, that if the cargo, or any part of it, should
be taken out of the vessel, by any of the belligerent powers, their
subjects, or citizens, the goods remaining on board should only be
subject to freight.

The cargo was consigned to James R. M'Corkle at Surinam, who
was ordered to sell the same, and ship a return cargo. It appeared
by two protests of the captain, that he sailed from Philadelphia on
the 3d May 1799, and on the 14th June in sight of land, he fell in
with a French armed sloop, called the Importune of Cayenne, who
plundered her of the greater part of her cargo, and left on board
merchandise to the amount of \$506 and 75 cents. Two of the crew
only were permitted to remain on board the schooner; the captain
and the rest of the crew were put into a long boat, and arrived at
Surinam, without papers or letters. The schooner also arrived there
on 21st June, without a register, or other papers, having been
plundered thereof by the privateer. The captain informed M'Cor-
kle, that the schooner's cargo was consigned to him, and desired
him to furnish him with a loading back to Philadelphia. M'Corkle
swore, that he refused to do this, as he had received no instructions
for that purpose; and that the captain had applied also to one Hen-
ry Anderson, to freight him back, who likewise refused. That in
conversation with captain Ford, he had advised him as a friend, and
in no other character, to sell the vessel and cargo for the benefit of
those concerned. The schooner was sold accordingly at auction to
Beninger and Co. for 1150 guilders, and the remnant of the cargo
being on board, Ford directed them to sell the same at auction,
which was also done, and an account current was afterwards fur-
nished. M'Corkle purchased the schooner back from Beninger
and Co. for the defendant; but told Ford he would let the plain.

tiffs have her back, if they would repay all his expenses, provided their outward voyage was not insured. The delay of the schooner at Surinam arose from different causes, the state of the place which the British forces took possession of on the 22d August, the want of a cargo on freight, and the want of a convoy. M'Corkle obtained a special permission for her to depart. The return cargo was put on board under bills of lading. One Lawrence, of New York, on the 30th August 1799, shipped 42 bales of cotton at \$5 per bale freight; and M'Corkle shipped 82 hogsheads of sugar on the 16th September following, at \$8 per hogshead freight, consigned to the defendant. M'Corkle further swore, that he knew nothing of the existence of the charter party, and that he had no design or intention in the friendly communications he had with Ford to nullify or affect the same in any shape.

Captain Ford, in a deposition taken under a rule of court, swore to the facts contained in his two protests, and that the vessel was delivered up to him at Surinam on the 24th June, and that she was ready to receive her return cargo on board on the 13th July, but was detained by M'Corkle until the British took possession of the place, and that after having obtained permission to depart, he waited until October for convoy. He believed that the object of M'Corkle was to break the charter party by a sale of the vessel.

It appeared that the defendant had insured his outward cargo, and on receiving information of the loss, had on the 16th July abandoned to the underwriters. The loss was estimated at \$7209 and 44 cents, and was afterwards settled at the rate of \$86 and 70 cents per cent.

The defendant gave in evidence by way of set-off, two notes from the plaintiff to him, dated 12th November 1792, the one for \$1047 and 3 cents, payable in 3 months after date, and the 2d for \$1052 and 28 cents in 4 months.

Mr. M. Levy for the plaintiff, claimed \$1240, the demurrage of the schooner in Surinam, for 62 days from 16th July to 16th September; and \$1460, the one half of the freight in the charter party, on the return cargo.

The plaintiffs claim no demurrage, while the vessel waited for convoy: but they deem themselves entitled thereto after the 20 days were expired, until the sugars were shipped on board. Where the correspondent does not load the vessel on her homeward voyage upon the day agreed on, the master may return empty, or obtain another cargo; but if he stays, the usual freight only shall be paid, and a compensation be made in the nature of demurrage to the owners. Abbot 158, Lond. ed. Jamieson and Co. v. Laurie. In Dom. Proc. 10th November 1796.

If the agent abroad cannot, or will not put any thing on board, after the master has laid the days agreed on by the charter party, the owner shall be paid his freight, empty for full. *Beaw. Lex. Mercat.* 121, 4th ed.

The ship is also entitled to the homeward freight, that is, one half of the entire freight stipulated to be paid. The want of the register and other sea papers was no ground of objection, why the consignee did not furnish an early return freight. If a vessel be stripped of her credentials of character, either by accident or force, she is not liable to confiscation. 1 *Rob. Admiralty Cases* 100. *Lond. ed.* 84, 85. *American ed.* The conduct of M'Corkle is very extraordinary, when contrasted with the deposition of Ford. Why was the schooner sold at Surinam, except to complicate the business? Why was she detained from July to September, except as the captain swears, to break the charter party? The sale of the vessel by the captain was the effect of coercion by the consignee, who on no other terms, would allow any part of the cargo to be put on board. But she has performed her return voyage, and is therefore entitled to the homeward freight, according to the terms of the charter party. The East India Company might by charter party keep a ship they had freighted for a long time in India, and did so keep her, until she was unfit to return home; though by the charter party the freight was payable on her return, yet the company was decreed to pay the damage. 2 *Vern.* 210. The case of *Westland v. Robinson* was therein cited by the Lord Chancellor. *Ib.* 212. Where no freight was to be paid for the cargo outwards, but freight homewards, and the factor abroad had no goods to lade her homewards, the payment of the freight was decreed. A vessel taken by the enemy and retaken, and not otherwise incapacitated, she may proceed after restitution, and the whole freight will be due. 2 *Burr.* 886. In case of a loss at sea, freight must be paid in proportion to the goods saved, or the part of the voyage which was performed. *Ib.* 889. A ship is freighted, and she receives her lading, an embargo happens and the lading is taken as forfeited, yet the owners shall receive freight; for here is no fault in them, but only in the merchants. 1 *Mol. lib.* 2. c. 1. § 12. 9th ed. 316.

Messrs. Ingersoll and Watts for the defendant, contended, that the capture vacated the charter party. Here there was a total loss, and the voyage was wholly broken up. No freight therefore could be due, and of course no demurrage. The goods were to be transported to Surinam, and there delivered to M'Corkle. The outward cargo was to be there sold, in order to form a fund for the purchase of the return cargo. But the schooner was taken during her voy

age, and stripped of the greater part of her cargo, as well as all her papers and letters. Hereby the plaintiffs lose their freight. 6 T. R. 482. The consignee received no instructions from the defendant to furnish a cargo back; he could not with any degree of prudence, rely on the verbal information of the master, whom he never saw before; and if even this information could have been relied on, the small remnant of the outward cargo would have been inadequate to purchase another freight. The plaintiffs have been guilty of an oversight in not insuring their freight, which they might well have done. 8 T. R. 362. 6 T. R. 478.

There is no presumption of collusion between the intended consignee and the master. The former gave him the best advice he could, under existing circumstances. Beninger and Co. sold what remained unplundered of the cargo, at auction. By the terms of charter party, demurrage is only to be paid for the default of the freighters; here was no default in them. It is not contended, that the defendant should pay the freight of the outward cargo. The law, independent of the special note at the foot of the instrument, would secure him against such demand. And no reason can be assigned, why the freight specified in the charter party, should be paid on the inward cargo, when the bills of lading signed by the captain, ascertain the special agreement of the parties for freight, during that voyage. In all the cases cited by the plaintiff, the outward cargoes were delivered; and here the charter party directs, that the freight shall be paid on the delivery of the homeward cargo. It is a sufficient defence, that the voyage was not performed according to the agreement of the parties. Abbot 258. 7 T. R. 381.

The court submitted to the jury, whether there was the smallest ground to infer collusion between the consignee and the captain, or coercion on the part of the former as to the latter. M'Corkle had no means of knowing that the return freight stipulated for, was less than that agreed upon in the charter party. It could not be expected, that he should receive the agency without written instructions from the defendant.

Here was no default in the defendant, or his factor, to entitle the plaintiffs to demurrage. The claim of freight under the charter party was avoided by the capture of the vessel, and plundering her of more than $\frac{7}{8}$ of her cargo. The voyage was thereby defeated and a total loss accrued. The defendant abandoned to the underwriters, and having made his cession to them, he had no further concern in the cargo. The claim for the homeward freight rested solely on the bills of lading.

The jury certified in favor of the defendant \$1700 3, as due to him.

JOHN CRAIG, MATTHEW PEARCE and ROBERT SMITH, assignees of JAMES YARD, a bankrupt *against* THOMAS MURGATROYD.

On a double insurance, the insured may apply to either set of underwriters at his election. If the first policy be open, and the other valued, and he cedes to the insurers on the open policy, as much as they insured, and obtains payment as for a total loss, and he has short property on board, he shall only recover on the valued policy for the loss on the property he could cede on the same.

MOTION for a new trial, on a policy of insurance.

The cause was tried in Bank, on the 11th December last, and a verdict given for the defendant.

It was brought on a second policy of insurance, made on the 25th March 1797, on coffee laden, or to be laden on board the brig Sea Nymph, George Hasty, master, each and every pound weight of the coffee being valued at 20 cents, from Caymette, in the West Indies, with liberty to touch and trade at Jeremie and the mole, with or without convoy to Philadelphia. The subscriptions on this policy amounted to 13,000 dollars, whereof the defendant subscribed \$1,500 for the premium of 15 per cent., at the the insurance office of Wharton and Lewis.

A previous open policy had been subscribed on the 18th January 1797, by the Insurance Company of Pennsylvania, for 12,000 dollars on the coffee, in the same brig, from Jeremie to Philadelphia, for the premium of 12½ per cent.

The brig was laden at Jeremie, by Martin Sarrison, the agent of Yard, and set sail from thence. She was boarded on the 1st February 1797, by a French brigand barge, and carried into Cape Francois, where on the 7th Prairial, in the 5th year of the republic, the vessel and cargo were condemned in the French court of prizes, on the ground of her being laden with colonial produce of a revolted port in a state of siege, under the protection of the British government.

On the 19th December 1797, Yard executed an abandonment to the Insurance Company of Pennsylvania, ceding to them so much of the property as they had insured. And on the 29th January 1798, he abandoned to the insurers in the office of Wharton and Lewis, reciting the two policies, and ceding the residue of the coffee to them.

On the 9th February following, the protest and copy of the sentence of condemnation were left at the insurance office of Wharton and Lewis; and on the 17th of the same month, they were returned, with an offer of returning the premium.

The insurance Company of Pennsylvania, afterwards adjusted their loss with Yard, and paid him 11,760 dollars. The underwriters in the office of Wharton and Lewis, agreed to pay at the rate of \$30,51 for each \$100, by them respectively subscribed, without injury to the claim on either side; and the defendant, Murgatroyd, paid to the

bankrupt in pursuance thereof, \$457 35 March 13, 180.

The plaintiffs claimed of the private underwriters, at the rate of \$64 37 on each \$100 with interest thereon.

The pretensions of both parties are correctly designated in the following statement made by Wharton and Lewis :

| | |
|---|-------------------|
| It is agreed, that the coffee included in the two policies, weighed according to the French standard, | 92,966 <i>lb.</i> |
| Add 8 per cent. to bring it to American weight, | 7,437 |

100,403*lb.*

All the coffee included in the invoice, which was insured, cost 97,667 livres, which at 22 livres for 20*s.* is 4439*l.* 8*s.* which carried out in dollars, amounts to 11,838 dollars 40 cents.

| | |
|---|-------------|
| Mr. Yard received from the Insurance Company of Pennsylvania, on a prior insurance of \$12,000, | \$11,760 00 |
| He paid a premium thereon, | 1,550 50 |

Hence the insurance produced the net sum of \$10,260 00 and left a balance to be carried to 2d policy of \$1,578 and 40 cents, which is payable in coffee at 20 cents per lb—

| | |
|---|------------|
| Therefore, if \$11,838 and 40 cts. gave 100,403 lbs. of coffee, what will \$1578 and 40 cents give? Answer, 13,884 lbs., which, at 20 cents per pound, is | \$2,676 80 |
|---|------------|

| | |
|---|---------|
| To a return premium of \$14 and 25 cts. per cent. (as the assurers are entitled to 5 per ct., on the premium of 15 per ct.) on the sum over insured of \$10,823 and 20 cts. | 1542 30 |
|---|---------|

\$4219 10

Therefore, if \$13,500 be subject to pay \$4,219 and 10 cts., each \$100 is answerable for \$30 and 15 cts.

But it is contended by the assured, that the valuation in the policy of 20 cts. per lb., on each and every pound weight of the coffee, should be extended to all the coffee shipped by, or by order of Martin Sarrison, on board of the brig Sea Nymph, and the operation of that opinion is stated as follows :

It is shown in the preceding sketch, that the coffee weighed 100,403

| | |
|--|-------------|
| lb., which at 20 cts. per lb., amounted to | \$20,080 60 |
|--|-------------|

| | |
|---|-----------|
| And that Mr. Yard had a prior insurance made of | 12,000 00 |
|---|-----------|

| | |
|--|-----------|
| Which would leave to the debit of the policy in question | \$8080 60 |
|--|-----------|

| | |
|--|--------|
| Subject to a deduction of 2 per cent., as losses are paid at the rate of 98 per cent., | 161 61 |
|--|--------|

\$7,918 00

The sum insured is \$13,500 ; the property at risk, if the last opinion should prevail, was \$8080 and 60 cts.—consequently, Mr. Yard's property was over insured in the sum of \$5419 and 40 cts., and on which he is entitled to a return premium of \$14 and 25 cts. per cent., being

772 26

\$8691 25

Therefore, if \$13,500 being subject to pay \$8691 and 25 cts. each \$100 is answerable for \$64 and 37 cts.

As in the valuation of 20 cts. per lb., are comprehended not only the first cost and shipping charges, but also the premium of insurance and abatement (of 2 per cent. and brokerage of half per cent.) it follows, that this deduction of the whole sum insured by the Insurance Company of the state of Pennsylvania is proper.

On the trial, James Yard having released his surplus property to his creditors, was sworn. He declared, that Martin Sarrison was his agent at Caymette, and that it had been their practice to ship coffee in the name of Yard, to prevent difficulties with the French and Spaniards ; and that he was not sure whether he was interested in the coffee on board of the brig : that he had informed Sarrison of his having insured 12,000 dollars on the goods, but having reason to think that the brig had a larger quantity of coffee on board, he determined on making another insurance on the whole to the amount of 20,000 dollars, and believed he mentioned to the insurance broker, Isaac Wharton, that he had made a previous insurance in the office of the Pennsylvania Insurance Company of 12,000 dollars ; and that he having distinguished, from the information of Sarrison, the property in the coffee insured, had paid the losses on the same to the different shippers, or their attornies.

Isaac Wharton, the broker, pointedly denied his having received any other information than was contained in the written order of Yard to make insurance, and that nothing was said to him of a former insurance made on the coffee on board the brig. The order to insure 20,000 dollars on the coffee was produced ; and he declared it to be his uniform practice to grovern his conduct by his written instructions.

The plaintiff's counsel contended on the trial, that whatever was the true intention of the contracting parties, the same should prevail, independent of artificial rules or technical distinctions, in a commercial case. To recover upon a valued policy, the insured need only prove he had an interest, without showing the value, unless it be a cover to a wager. If it be an open policy, the prime cost must be proved ; but,

in a valued policy, it is agreed conclusively. Park. 304, 305, 1st ed., Grant v. Parkinson. 2 Burr. 1167, Lewis v. Rucker.

It is the province of the jury to weigh the testimony of Yard and Wharton. The former believed, that he mentioned to the latter the insurance which he had before effected. The latter is confident no intimation thereof was given to him ; but both rely on their practice respectively. If credit is given to the former, he must be supposed to have effected an additional assurance, and that the difference between the prime cost of the coffee, including charges, and the 20 cts. per lb., was considered in the light of profits, against the loss of which the insured were to be indemnified. But if credit is given to Wharton, the underwriters are subjected to the risk of a valued policy, in all possible events. It was expected that 20,000 dollars would be filled up in the second policy, but subscriptions were obtained for only 13,500 dollars. The valuation of 20 cts. per lb. is expressly set on each and every pound weight of the coffee shipped on board to Yard, which is agreed to be 100,403 lbs. American weight. The losses thereon he has paid to the different shippers, and his assignees deem themselves entitled to an indemnification for each pound of coffee at the rate of 23 cents, deducting therefrom 11,760 dollars received from the Pennsylvania Insurance Company. The first policy being open, the loss thereon must be estimated by the prime cost and incidental charges ; but as between the plaintiff's and the second set of underwriters, the whole quantity of coffee insured must be rated at 20 cents per. lb., and the latter be subjected to the loss thereon. This appears to be the plain object of the policy in question, and the words thereof cannot be satisfied by any other construction. A different meaning is put upon it by the defendant : he estimates 87,019 lbs. of the coffee at about 13½ cts. per lb., and insists that he is only subjected to his proportional loss on 13,384 lbs. thereof, rated at 20 cts. per lb. In other words, the plaintiffs look for an indemnification at \$64 and 37 cts. for each \$100 subscribed in the second policy, and interest thereon ; and the defendant conceives he has performed his contract by paying \$457 and 35 cts., which is at the rate of \$30 and 51 cts. on each \$100 of his subscription. The defendant by his calculation, confuses the prime cost of the article and incidental charges with a valued policy, and thereby reduces the valuation against the express agreement of the parties. Double insurances may be of various kinds : the first may be valued at one rate, and the second at a higher rate ; the same kind and the same pound of coffee may be the objects of two insurances, and the loss paid for accordingly. The plaintiffs have received one satisfaction

for part of the coffee insured at the rate of $13\frac{1}{2}$ cents, and consider themselves entitled to the additional $6\frac{1}{2}$ cents per pound, according to the stipulated valuation.

It will be objected by the defendant that the plaintiffs could only cede to the several underwriters the residue of the coffee, 13,384lb., for which only he is to pay the loss, at the rate of 20 cents. per lb. But on a valued policy, the quantity of property ceded cannot regulate the loss. In the case of the goods being destroyed by fire, or lost by the foundering of the vessel at sea, nothing remains to be ceded; and yet it cannot be denied but there may be recoveries in such cases. If the effect of the abandonment to the Insurance Company of Pennsylvania, would necessarily vest the 87,019 lbs. of coffee in them, the objection would have great weight. But the principal contended for is incorrect. Abandonment operates as a transfer to the insurers, in proportion to their respective subscriptions, without any regard to the priority of the policies, if more than one, and though the ship or goods should appear by the several policies to be over insured. 2 Marsh 519.

The point of abandonment cannot be of moment here; because the profits on the coffee were intended to be insured: it is similar to the case of wager policies, where there is nothing to cede. If valued policies are legal, it must often happen there can be no cession; though there must be an offer to abandon.

Should the prime cost of the coffee in the West Indies have been 25 cents per lb., the contract could not have varied thereby: neither shall it be varied by the jury, if it cost only $13\frac{1}{2}$ per lb.

It is settled, that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the other insurers. Park 321. Newbey v. Reed, Bla. Rep. 416. The same point has been determined in the Circuit Court of the United States, for the district of Pennsylvania, between Hurston and Hock, by Patterson and Peters, justices, in October 1800. The court held, that in cases of double insurance the assured may at his election, sue either set of underwriters, and that upon a recovery there should be a contribution of the other underwriters. This resolution led to the new modeling of the forms of policies in the insurance offices of Philadelphia, by introducing a condition therein, that priority in dates should govern in the payment of losses in all cases of double insurance, or of several insurances on the same property. If Yard had called on the second set of underwriters, in the first instance, there can be no doubt but he would have recovered 98 per cent. on their

full subscriptions. The prior application, either to the one or the other, cannot vary the right or conscience of the demand. The defendant has no reason to complain on this score. He and the co-subscribers to the second policy, obtained an additional premium of $2\frac{1}{2}$ per cent. and well knew, that the coffee was valued beyond its prime cost. The second policy was *sui generis*, and its true meaning should be adhered to. Unless the payment made on the first policy precludes the plaintiffs, they are entitled to recover their demand.

On the part of the defendant, the counsel urged on the trial, that though they widely disagreed from their adversaries, in the application of the law to the circumstances of the present case, yet there were certain legal truths, about which there could not possibly be any difference of opinion.

An insurance is a contract of indemnity against certain risks expressed in the policy ; yet there can be but one indemnification ; it shall always be construed according to the meaning of the contracting parties. Park, 33 . 1st ed. 320. In case of a total loss on an open policy, the prime cost of the property insured must be paid by the underwriter ; but he has nothing to do with the market, nor has any concern in the profit or loss which may arise to the merchants from the sale of the goods. *Ib.* 110, 111. 2 Burr. 1170. Before the insured can demand for a total loss, he must abandon to the underwriter whatever claims he may have to the articles insured. Park. 161. And by the law of England, he must abandon in a reasonable time, *Ib.* 92, whether the loss arise from shipwreck, capture, or any other peril stated in the policy. *Ib.* 161. It was formerly doubted, but it is now settled, that the profits of a voyage are an insurable interest, not within the British statute of 19 Geo. 2. c. 37. Grant v. Parkinson. Park. 306. (267) 1 Marsh. 111. Flint. v. *Le Mesurier*. Park. 268. 4th ed. Marsh 112. Baily v. Cousins. 2 East 544. But in all the cases it is held necessary, to express the profits *à nomine*, or by words tantamount, to be the object of the policy.

The application of these rules will decide the present question. As to the variance in the testimony delivered by Yard and Wharton, superior credit is due to the latter. The former swears to his belief ; the latter speaks confidently, stands wholly indifferent as the agent of both parties, and is fortified by the written orders of the former, which have been produced. The matter therefore is to be considered, as if the second set of underwriters had received no information of the first insurance made on the coffee.

What then was the object and effect of the first policy, de-

taching from our consideration the second subscription? It was an open or unvalued policy. As much coffee as \$12,000, would pay for at the outset, was thereby insured; for the residue, Yard then stood his own insurer. The premium, risk and cession are commensurate to the quantity; and the prime cost and incidental charges, form the criterions of decision. The second insurance could have no retrospective effect on the first, in case of loss. If the coffee had cost in the West Indies, 25 cents per *lb.*, the company must have paid accordingly. While there is a *spes recuperandi*, there must be an offer to abandon, otherwise there can be no recovery for a total loss. The cession, as well as the premium, forms the ground of recovery. No capture by the enemy, though condemned, can be so total a loss as to leave no possibility of a recovery. 2 Burr. 696. The present case is much stronger; America at the time of the loss, was not in a state of war with France. Upon the cession made to the Pennsylvania Insurance Company, of so much of the goods as they had insured, the claim to 87,019 *lb.* of coffee on board, became vested in them; and if the judgment of the court of admiralty, at cape Francois, had been reversed afterwards, they would have been entitled thereto. Yard or his assignees could only claim the remaining 13,384 *lb.* coffee. Where a party is the cause wherefore a condition cannot be performed, he shall never take advantage for non-performance thereof. Co. Lit. 206, *b*: There can be no difference between the absolute refusal of Yard, to abandon to the second set of underwriters, and his disabling himself from making such abandonment to the extent contended for. But in his abandonment to them, he recites the two policies, and only cedes to them, the remainder of the coffee.

Yard by his cession to the company, has unequivocally expressed his meaning, according to mercantile usage, that the 87,019 *lb.* of coffee, became their property, as fully as if he had ceded that quantity to them, in express terms. Having ceded to them, he could not cede the same coffee to us. The case must be decided on general principles, even on a capture by a French brigand barge!

It has been objected, that the point of abandonment is of no moment to the question, because the profits on the coffee were the objects of the second insurance. We answer, the profits were not insured; if it was so meant, it should have been so expressed; and *voluit sed non dixit*, will here apply. Besides, though profits, until reduced into possession, cannot be said to have a physical existence, yet there may be an abandonment of the profits, by abandoning the goods, from whence the profits are to arise. Vide 2 East. 551.

The case has been also compared to a wager policy. But the court will declare, that though we have no positive law like the English statute of 19 Geo. 2, c. 37, the course and nature of our trade has been always considered to interdict wager policies, as fully as if there had been a pointed regulation on the subject.

[To this, the whole court readily assented.]

The observation in 2 Marsh. 512, is not warranted by the authority, which he cites in support of it. Abandonment in the case of a double assurance, operates without regard to the priority of the policies, only where the party has so much insurable property on board. 2 Emerig. 194, § 6.

It is admitted, that in cases of a double insurance, the insured has his election against either set of underwriters as he pleases ; but he cannot recover more than he has lost, or obtain a satisfaction greater than the injury he has sustained. He can recover but one satisfaction. Park. 320-1. If Yard had gone in the first instance against the second set, and could have shown a proper abandonment to them, he might have recovered at the rate of 98 per cent, if such was the meaning of the contract, on the entire subscription. The underwriters' obligation to pay, is not varied by prior or posterior applications to them to discharge their losses. The subject matter of the insurance, is always to be considered. The 20 cents valuation per *lb.* is not on the whole quantity of 100,403 *lb.* shipped by Sarrison in the brig, but on the true quantity meant to be covered by the second policy. The defence is built on the fair intention of the instrument, and the act of Yard himself. He is already indemnified and has received full satisfaction for 87,019 pounds weight of the coffee, and has further received from the defendant \$457 35, his proportion of the loss on the remaining 13,384 *lb.* Consequently, he is not entitled to recover.

The chief justice gave it in charge to the jury, that in cases of double insurance, the insured had the option of applying to which set of underwriters they thought proper, on a loss happening. If as here, there was an open policy, and also a valued policy, and the prime cost of the merchandize with the attendant charges in the outset ; were less than the valuation, they would naturally be led to go on the policy, wherein the valuation was higher ; but if the valuation was less than the prime cost, it would be most eligible for them to proceed first on the open policy. But an insurance being a contract merely of indemnity, one satisfaction only can be had.

Mr. Yard has elected his first remedy on the open policy, subscribed by the insurance company ; and in pursuance thereof, has abandoned to them so much of the property as they had insured. He has received of them \$11,760, the full amount of their subscription, deducting 2 per cent. according to the stipulation in the policy. This according to the calculation which has been produced, vests in the Pennsylvania Insurance Company a right to 87,019*lb.* of the coffee insured ; and if the decision of the French Court of Prizes was annulled, they would have been entitled thereto, though it might exceed in value the sum they had paid, and the private underwriters could not have intermeddled therewith. So it would have been if the vessel had been wrecked, but the coffee had been saved. The act of payment itself by the company independent of the cession, would vest an interest in the company in the coffee, thus paid for. The plaintiffs cede to the private underwriters the rest of the coffee, reciting the two policies. Yard, at the time when he intended to make another insurance, probably expected, that a larger quantity of coffee would be shipped to him, which rendered it prudent to cover it by a second insurance to the amount of 20,00 dollars, though only 13,500 dollars were subscribed. But he having received an indemnification for more than $\frac{2}{3}$ of the commodity insured, had only an insurable interest in the remaining $\frac{1}{3}$, which is said to be 13,384*lb.*, rated at 20 cents per *lb.* Under any other construction of the second policy, the insured would obtain a double satisfaction for the same property, which opposes the whole law on the subject of insurance. Mr. Yard has ceded to the insurer on the second policy, in fact, but 13 384 *lb.* of coffee, the proportional loss whereon at the rate of 20 cents per *lb.*, he has received from the defendant. His assignees must be bound by his acts. It does not appear by the second policy, that he insured his profits on the coffee.

The arguments of the counsel in favor of the motion for a new trial, and in opposition thereto, were substantially the same as have been already detailed, and therefore are not enumerated. The court observed, that their minds had not been changed thereby ; but Mr. Rawle suggesting, that he would obtain the sentiments of merchants, skilled in the subject of insurance on this novel point, the court continued the motion under advisement, until such opinions could be procured on the commercial usage of the city.

Afterwards the opinions of Samuel W. Fisher, President of the Philadelphia Insurance company, Thomas Fitzsimmons, President of the Delaware Insurance Company, and of Isaac Wharton were produced, which ascertained the mercantile usage to be as laid down by the chief

justice in his charge to the jury, and to be grounded on the same principles. Whereupon, the motion for the new trial, was denied unanimously.

Messrs. E. Tilghman and Rawle, *pro quer.*

Messrs. Ingersoll and Lewis, *pro def.*

ALEXANDER KERR, for the use of JAMES TAYLOR and JAMES LYLE, trustees for the creditors of KERR and HAWTHORNE *against* THOMAS HAWTHORNE, JOHN M. NESBIT and JONATHAN MEREDITH.

On the dissolution of a partnership, one partner gives a bond to the other to pay off the company debts, and indemnify him with surety; which is afterwards assigned to trustees for the use of the creditors. He'd on demurrer, that the bond may be well sued in the name of the partner for the use of the creditors.

Issues in fact must be tried by a jury previous to judgment.

DEBT on an obligation, in the penalty of 250,000 dollars dated 1st April 1797, with a special condition, as follows: Whereas the said Thomas Hawthorne and Alexander Kerr have mutually agreed to dissolve and discontinue the co-partnership, heretofore subsisting between them, and have agreed that the said Thomas Hawthorne shall take to himself all the goods, merchandizes, stock in trade and outstanding debts due to them, and shall assume the entire payment of all the debts and engagements due by their said co-partnership, the whole of which are to be paid as within specified. Now the condition of this obligation is such, that if the above bounden Thomas Hawthorne, shall and do well and faithfully comply in all things, with the agreement hereinbefore recited, and shall and do well and truly pay and discharge all and every the debts and engagements due by the said co-partnership, within the periods within recited, and if he, the said Thomas Hawthorne, his heirs, executors and administrators, shall and do at all times hereafter save, keep harmless and indemnify him, the said Alexander Kerr, his heirs, executors and administrators, and his and their goods and chattles, lands and tenements, of and from the said debts and engagements, or any part thereof, and of from all costs, suits, trouble and loss, and damages for and on account of non-payment thereof, then the above obligation shall be void, otherwise remain in full force and virtue.

Articles of agreement, bearing even date with the said obligation, were executed by Hawthorne and Kerr, whereby they agreed to dissolve their co-partnership, Hawthorne to take all the stock in trade, and outstanding debts into his own hands, and pay all the partnership debts in 12 months, except for the merchandize received during that spring, to pay Kerr 9,000 dollars, for his share of the partnership, and to indemnify him with sufficient sureties, &c.

On the 7th March 1800, Kerr in consideration of 5s. assigned such part of the obligation, as would satisfy a debt, due from the co-partnership, to Annie Lang and William Hawthorne.

And on the same day he assigned to James Taylor and James Lyle, for the use of the creditors of Kerr and Hawthorne, the residue of the bond, after paying the demand of Lang and Hawthorne.

Nesbit, one of the obligors, died after the commencement of the suit. Hawthorne became bankrupt, and obtained his certificate of discharge. The declaration was filed in the common form, against all the obligors, in the name of Kerr, for the use of Taylor and Lyle, the trustees, &c.

And the said Jonathan Meredith also prays oyer of the said assignment, which is read to him in these words, (*prout* assignment from Kerr to Taylor and Lyle, dated 7th March 1800,) &c.

Which being read and heard, the said Jonathan, by Moses Levy, his attorney, comes and defends the force and injury, when, &c., and saith that the said James Taylor and James Lyle, to whose use as trustees for the creditors of Alexander Kerr and Thomas Hawthorne, this writ hath been commenced and prosecuted in the name of the said Alexander, ought not to have or maintain their said action against him; for that the said obligation in the declaration mentioned, and the assignment above set forth, are not sufficient in law to maintain the said James Taylor and James Lyle, to have the said action, to which the said Jonathan hath no necessity, nor is by the law of the land bound to answer. Wherefore he prays judgment, and that the said James Taylor and James Lyle, may be precluded from having the same action.

And the said Jonathan by leave of the court here also for that purpose given, according to the form of the statute in such case made, also pleads that he hath done and performed all things, the duties and engagements in the condition of the said obligation preferred and set forth, which on his part, ought to have been done and performed, and of this he puts himself upon the country, &c.

The plaintiff joined in demurrer, and replied to the plea, setting forth breaches, to which there was a rejoinder and issues were joined.

The counsel in support of the demurrer, stated the question to be, whether the present suit can be supported for the use of the creditors. The court must say, whether the creditors have a remedy on this bond,

and to what extent the relief will go. And in forming their judgment, they will confine themselves to the record.

It will not be said, that the obligation is assignable, with the special condition annexed, so that the assignees might support a suit in their own names. In England, the assignee of a bond takes it subject to every equity, and the principles on which chancery proceeds on such assignments, are correctly laid down in Gilb. *Lex Prætor*. 288, 290, 291. In this state the assignees of bonds, specialties, and notes, may sue at law in their own names, for the recovery of the money mentioned therein, or so much thereof as shall appear to be due at the time of the assignment, in like manner as the original obligee or payee might or could have done. *Wheeler v. Huges*, 1 Dall. 23. *M'Cullough v. Houston*, *Id.* 441.

The true intent of the bond must be taken into consideration; it was given to indemnify Kerr on the dissolution of the partnership. Indemnity in its nature is merely personal. Some things are in themselves of so inseparable a nature, that they cannot be given over to another; and several instances of this kind are mentioned in *Englefield's case*. 7 Co. 12. *b.* 13. *a.* The creditors are no parties to this instrument. No consideration moved from them, when the obligation was executed, and no good reason can be assigned why then should obtain any benefit by the contract. If the creditors had released either Kerr or Hawthorne, a suit could not be sustained on the bond; nor could it be sued if Kerr had become bankrupt or had died insolvent. One who becomes liable for the debts of another, is no creditor until he has paid them; nor until then can they be proved under a commission of bankrupt. 7 T. R. 364, 612. Hawthorne has obtained his certificate as a bankrupt. As against a surety, a contract cannot be carried beyond the strict letter of it. 2 Term Rep. 370. But to convert a bond of indemnity into a security for the demands of third persons, would substantially change its very nature and design.

The plaintiffs' counsel insisted that the case was too plain for dispute. It is admitted that the bond containing a special condition is not negotiable. The suit could only be brought in the present mode.

The bond is payable to Kerr, his attorney, executors, administrators, or assigns, and is conditioned for the payment and discharge of the debts and engagements, due by the former copartnership, within limited periods. It is not a contract of a personal nature. It points out the mode of indemnity by payment of the debts, for which he was before firmly bound, jointly with his partner. Payment in this particular, therefore, is indemnity. *Cro. El.* 631. The demurrer admits a forfeiture of

the bond if the pleadings are correct, and that Kerr might sustain a suit on it for his own benefit. Every deed by which a man acknowledges himself indebted to another, is valid and binding on him. Dy. 21, a. As far as Kerr has paid the company debts, which Hawthorne was separately bound to pay, since the stock in trade came into his hands, he stands as a creditor. In fact, verdicts have passed against the company for debts which Hawthorne stipulated to discharge. Under the circumstances of this case, Kerr would not be permitted to discontinue the suit if he was so inclined. 1 Dall. 139. And it is contended, that even if he became bankrupt, or had died insolvent, an action might be maintained on the obligation for the use of the creditors. The surety is answerable for the payment of the company debts by express words; and considering this court as possessed either of common law or chancery powers, the bond affords a full and complete remedy.

By the court. The suit as brought appears to us to be within the plain words and intention of the bond.

Demurrer overruled.

A rule was afterwards obtained, to show cause why judgment should not be entered in favor of the plaintiff, for the penalty of the bond, on which the suit is founded; with liberty to take out execution for \$2284 95 cents, with costs, being the amount for which a verdict and judgment have been obtained upon a trial on 3d September 1804, and the penalty to stand as a security for any other debts, within the terms and meaning of the said bond, and the agreement of counsel filed in this cause, on the 12th March 1804.

It afterwards came on for argument. In support of the rule, it was insisted, that every species of delay had been shown in this cause. A plea in abatement that a former suit was depending for the same ground of action, was filed in December term 1800. When that plea was opened in March term last, the court recommended that it should be withdrawn, and the action tried on its true merits. This was acquiesced in, and a special agreement signed, the general effect of which was that the debts due from the former co-partnership, which were the objects of the obligation, should be established by due process and adjudication. It was intended to facilitate the remedy of the creditors. The court have power to enforce it, and they must exercise that power, for the sake of justice.

The plaintiff in his replication has assigned as a breach the

non-payment of the company debts, due to Gregg and Co., and the defendant took issue thereon by his rejoinder. That debt has since been established in the suit brought against Kerr and Hawthorne on the 3d September last to the amount of \$2284 95 cents; another action has been tried by Thomas Risdal and George Bowman against the company, on the 5th March instant, wherein there was also a recovery. What have we then to try? The rejoinder admits the debt of Gregg and Co., to be within the bond of indemnity: it only can be ascertained by the record. By the rules of practice, an affidavit of defence must be filed, to prevent judgment. The affidavit here filed, is of the most general nature.

In debt for a penalty, for non-performance of covenants, judgment on a demurrer may be entered up for the penalty in like manner as before the stat. of 8 and 9 Will. 3. c. 11, but then it can only stand as a security for the damages sustained. Cowp. 357, 8, 9. In covenant, the breach may be assigned as large as the covenant; but in debt for a penalty, a precise breach must be shown, because a breach is a forfeiture of the whole bond. 1 Ld. Raym. 167.

In debt for penalty, on articles of agreement, the plaintiff may assign as many breaches as he pleases, that the damages may be assessed by the jury on each breach; but the plaintiff cannot take a verdict for the whole debt. 2 Wils. 377.

Pursuing the spirit of these cases, it has been adjudged, that the penalty of an agreement cannot be pleaded by way of set off. 2 Burr. 1024. Vid. 10. Wentwo. System of Pleading. Gen Index, 68, tit. judgment.

The defendant's counsel showed cause. The defendant has complied with the rule of the court by filing an affidavit in the terms of the rule. The agreement of counsel was intended to advance the justice of the case, but not to give up any legal ground of defence, which Meredith may have. The names of Gregg and Co., or of Risdal and Bowman, do not occur in the obligation. It is one thing to establish a debt due to either of them from the co-partnership, but another thing, to reach the surety under all the circumstances of the case.

The court do not possess the power of entering a judgment, before the defendants' plea is tried in this suit. It concludes to the country, who only can constitutionally try it. It is an issue in fact. Where two pleas are entered, both must be tried before judgment can be given. 10 Vin. 67. pl. 7. The issues in fact must be tried. *Ib.* 9. pl. 2, 3, 4. In trespass, the jury found a verdict, as to part of the charge,

of not guilty, but no verdict as to the rest ; the judgment was reversed. 3 Salk. 372. Two executors plead different pleas ; a judgment was entered against both on a verdict had on one plea only, and was held bad. 2 Stra. 1055.

By the court. Whatever our ideas of the merits of the present case may individually be, we certainly are not authorized to enter judgment in the action for the plaintiff. Issues in fact are joined, which must previous to any judgment we can give, be tried by a jury of the country.

Rule discharged.

Messrs. Ingersoll, Rawle and Dallas, *pro quer.*

Messrs. E. Tilgham, Lewis and M. Levy, *pro def.*

JARED INGERSOLL *against* THOMAS BRADFORD.

The defendant in a feigned issue to try the validity of a will, must pursue the words of the order of the register's court.

THIS was a motion by the plaintiff for a rule to plead by the first day of the next term, entered 14th December 1801.

The cause was a feigned issue to try the validity of a will.

On the 31st December 1798, a paper was filed in the register's office of the county of Philadelphia, dated 23d April 1793, purporting to be the last will of William Bradford, esq., and republished on the 19th August 1795.

On the 27th February 1799, a *caveat* was filed by the defendant.

The following proceedings took place in the register's court, held at Philadelphia on the 25th November 1801, and continued by adjournment to the 5th December 1801.

Whereas upon the hearing of the above cause, litigated before the register's court, upon a certain instrument of writing, bearing date 23d April 1793, purporting to set forth the contents of the last will and testament of William Bradford, esq., late of the city of Philadelphia deceased, the original whereof the said Jared alleged was unadvisedly destroyed by the said William Bradford during his life, when *non compos mentis* ; and a dispute has arisen between the said parties, whether the said will was and continued to be of force at and after the time of the death of the said William, and whether the said Jared is intitled to the probate of the said writing, or to any, and what part thereof ; and the said Jared hath requested, that an issue may be directed to try the said facts ; it is hereby ordered by the court, that an

action on the case be entered in the court of Common Pleas of Philadelphia county, as of the ensuing December term, in the name of Jared Ingersoll against Thomas Bradford, and that the plaintiff declare as upon a discourse had and moved between him the said Jared and the said Thomas, of and concerning whether the said William Bradford on the said 23d April 1793, made a last will and testament as set forth in writing, or if agreeable to the principles and rules of law in any and what part of the said writing, and whether the same was and continued to be in force at the time of the death of the said William ; and upon a wager in consequence thereof, the said Jared averring the affirmative of the question, and the said Thomas denying the same, so that the issue aforesaid may be fairly tried. And if the jury shall find for the plaintiff, that they shall find the same will, or such part thereof, as shall be proved, if agreeable to the rules and principles of law, as set forth in the said writing, upon the trial of the said issue in *hæc verba*; and the same shall be returned to the register, and letters testamentary granted accordingly, for so much as shall be found by the said jury as aforesaid.

And it is further ordered, that the circumstances of the said wager laid in the declaration shall be confessed, so that the trial may be had on the merits only, and costs of suit shall follow the verdict ; but that the said verdict shall not give to either party a right to recover the sum laid in the declaration.

CHARLES SWIFT, Register.

John D. Coxe, Pres. of Com. Pleas, 1st. Dist. Penns.
J. B. Smith. Associate Judge, Philad. county.

The plaintiff's declaration consisted of two counts.

The first count set forth the whole will in *hæc verba*, the different devises, and bequests therein contained, and the appointment of Joshua M. Wallace, Elias Boudinot and the said Jared Ingersoll, as executors ; there was an averment therein, that the paper contained the contents of the will. Its phraseology was in the first person.

The second count set out the will, omitting fourteen of the legacies contained in the former count, and the appointment of Jared Ingersoll as sole executor. The words used therein run in the third person.

The defendants counsel insisted, that he was not bound to plead to the declaration as filed, by reason of its variance from the decree of the register's court.

The first count is somewhat exceptionable ; but the last is wholly inadmissible.

The first count avers, that the paper set forth contained the contents of the will. This statement would render the witnesses and jurors, judges of the law, as well of the fact; the order of the register's court is, that if the jury find for the will, they should find it in *hæc verba*.

The second count refers to a certain other writing, which never was filed with the register, nor any *caveat* entered against it. It does not state the will in *hæc verba*, but gives the relation of a witness respecting it using the words in the third person. No ascertained form of expression as used by the testator, is pretended to herein, which only could secure certainty.

The register's power is founded on positive law. The act of June 1712, which is still in force as to this point, directs, that where objections are made, or *caveats* entered against the proving of any will, or granting letters of administration, &c., the register shall call in two or more justices of the Common pleas, to decide thereon. Penns. Laws 59. Miller's ed. The act of 13th April 1791, § 18, declares, that the register's court shall at the request of either party, send an issue into the Court of Common Pleas of the county, upon a dispute upon fact arising before them to try the said facts. 2 St. Laws 98. It is therefore a specific will against which the *caveat* may be filed, and the register's court can send but one issue to be tried.

If the jury should find for the plaintiff on the second count of this declaration, it could not possibly be sent back to the register nor admitted to probate. The garbling of a will, as in the present instance, would inevitably produce serious injustice. Both wills cannot be established, because they are inconsistent and materially different. Fourteen legacies are left out in the second count, and the share of the residuary legatee is increased in the same proportion. The plaintiff could not swear that he believed the second count contained the last will of William Bradford. We will readily plead, if the ancient form of declaring in feigned issues is adhered to.

The plaintiff's counsel urged, that fictions shall never be used, so as to defeat the ends of justice. Doug. 108. The true question is whether the paper produced, or any part of it can, be set up as the will of William Bradford. The substantial point should always be kept in view. There is no precise form of declaring on a wager; different modes have been adopted. We have pursued a precedent, which occurs in Sherid. Pract. B. R. 552. Our second count is inserted, to stop up every loop-hole.

The plaintiff contends, that if the destruction of the will by the testator in a fit of insanity can be established by two witnesses, particular devises may be proved by one witness. He further contends, that

if the substance of the will thus destroyed can be established by two witnesses, or if a part thereof can be thus established, that he is entitled to the probate of the whole will, or such part as can thus be made out by due proof; and such is the order of the register's court. But the defendant's objections to the second count go to show, that a destroyed will can in no instance be set up; and that the contents or substance thereof are of no moment, though they have been preserved with the greatest degree of correctness. The formal ascertained expressions of the testator cannot be shown, when the paper containing them no longer exists.

The first count is said to be somewhat exceptionable, but is not much objected to. They thereby admit, that either the whole will or a part of it may be established.

The effect thereof would be precisely the same, as is objected to on the second count. The plaintiff asks for the trial of one issue only, on two counts of the same nature and subject matter. The insertion of the second count is deemed material; but the court will adopt the best method of ascertaining the truth of the disputed facts between the parties.

By the court. The feigned issue is grounded on the order of the register and the assistant judges. The pleadings must be conformable thereto, and should pursue the terms of their decree. The defendant is not bound to plead to this declaration; and the rule to plead must be discharged.

Afterwards on motion of the defendant's counsel a rule was granted that the plaintiff should file a declaration within two months, in which the wager should be stated in the words of the order of the register's court, or that a *non pros.* be entered.

Messrs. E. Tilghman and Rawle, *pro quer.*

Messrs. Lewis and Todd, *pro def.*

Lessee of DANIEL DOUGHTY and DANIEL GROVES *against* NATHANIEL BROWNE and LIBERTY BROWNE.

Lessee of NATHANIEL BROWNE and LIBERTY BROWNE *against* DANIEL DOUGHTY and DANIEL GROVES.

"Touching all my worldly effects, both real and personal, I give as follows;" After directing the payment of his debts and funeral expenses, and bequeathing a legacy of 10*l.* he devises to L. "all the rest of his estate, both real and personal, to be at her own disposal, as she may think proper, all plate, moneys, goods and chattels," &c. These words pass a fee simple in the lands.

THESE causes came to trial at Nisi Prius, in Philadelphia, on the 25th February last, when a juror was withdrawn, and the following case submitted to the court.

Samuel Browne being seized of the premises in question, died so seized, having made his last will in writing, dated 13th November 1797, whereby after directing the payment of his debts, and funeral expenses, and bequeathing a legacy of 10*l.* to his nephew, he devised as follows: "Item, I give and bequeath to my beloved wife Louisa, all the rest of my estate, both real and personal, to be at her own disposal, immediately after my decease, to be at her own free will to dispose of as she may think proper, all plate, moneys, goods and chattels, debts, dues and demands whatsoever."

The following are the introductory words: "touching all my wordly effects, wherewith it hath pleased the Lord to bless me with, both real and personal, I dispose thereof in the following manner, to wit," &c.

Louisa Browne, the widow, by her will, dated 24th December 1802, appointed Doughty and Groves, the lessors of the plaintiff in the first action, and the defendants in the second action, executors, with power to sell, &c.

The question is, whether an estate in fee simple, or for life, passed by the will of Samuel Browne, to his wife Louisa, in the premises mentioned in the declarations in the above two actions. If the court shall be of opinion, that an estate in fee simple vested by the said will in Louisa Browne, a judgment is to be entered in favor of the plaintiff in the first suit, and for the defendants in the second; and vice versa.

The court desired the counsel for the Brownes to begin.

Accordingly Messrs. Wells and Dickerson contended, that there were no express words in the will to vest the devisee with an estate in fee simple, nor did she take it by necessary implication. The clause under which Louisa took, was strangely inconsistent; the first part of it includes both real and personal estate, but in the close of the sentence, it is narrowed down to "plate, moneys, goods and chattels, debts, dues

and demands." Under such ambiguous words, the heirs at law of Samuel Browne, shall not be stripped of this property, nor shall the same go out of the family of the husband, without the clearest intention. This intention is to be collected from the whole of the will, so as to leave no doubt in the mind. Particular cases serve rather to obscure and confound, than to illuminate questions of this kind. 3 Burr. 1541.

The words "as to all my worldly estate," in the beginning of a will, unconnected with any particular devise, show an intention to dispose of the whole estate, but will not carry an estate that is clearly omitted. 1 Dall. 226. Where a will began with "for those wordly goods and estates, wherewith it has pleased God to bless me, I give and demise to A., her heirs and assigns forever, all my lands at B., and I give and bequeath to A. aforesaid, all my lands, at C." A. only takes an estate for life, in the lands at C., and the reversion descends, although the will contains a legacy of 1s. to the heir at law. Doug. 730, (759.) Whatever may have been former decisions, it is now clearly settled, that such introductory words are not of themselves sufficient to carry a fee. 8 T. R. 67. The rule of law is established and certain, that express words of limitation or words tantamount, are necessary to pass an estate of inheritance. *Ib.* 502. All his estate will pass every thing a man has; but if the word all is coupled with the word personal, there the gift will pass only personalty. Cowp. 306. A strong instance of the inefficacy of introductory words to pass an estate in fee simple, is to be found in the same book, 657. *Denn v. Gaskin*. There must be express words or necessary implication, to vest in the devisee, an estate in fee simple. 3 Wills. 418. By a devise of "all my goods, leases, estates, mortgages," &c. an estate in fee does not pass. Cro. Car. 447, 449. The operation of the words "all my estate," is fully settled in *Salk. 233. Countess of Bridgewater v. Duke of Bolton*. But where estate is mentioned generally, accompanied with personal things, it shall be restrained to personal.* Money will not pass by a devise of all goods and things of every kind, where the devisee has a money legacy at the outset of the will. 2 Atky. 113. The court will intend an intestacy, in favor of the heir at law, unless there is a clear intention to pass the real estate. *Ib.* 103.

The court stopped Mr. Milnor, who was prepared to answer the cases cited, and to cite his law authorities: They said it was impossible to doubt the intention of the testator, on the face of the will. He has used strong introductory words, which fully evince

*The book adds, "but never, where real estate is mentioned; for then the personal things mentioned, shall be considered only an enumeration of those specific things."

his intention of disposing of all his property. He has given all the rest of his estate, both real and personal, after payment of his debts and funeral expenses, and a legacy of 10l. to his nephew, unto Louisa Brownes his wife. The only difficulty on the will, seems to be, the discovery of any legal or rational grounds, why she should not take an estate in fee simple in the premises.

Judgment for Doughty and Groves in both suits.

The following cases were cited by Mr. Milnor on the trial. 2 Bac. 53, Devise, C. Murray v. Wise and wife. 2 Vern. 564. Prec. Cha. 264. 1 Eq. Ab. 177, pl. 15. Countess of Bridgwater v. Duke of Bolton, 1 Salk. 236. 6 Mod. 106. 1 Equ. Ab. 177, pl. 17. Carter. v. Horner, 4 Mod. 89. 1 Show. 348. 1 Equ. Ab. 177, pl. 16. Reeves v. Winnington, 4 Mod. 45. 2 Show. 249, 2 Equ. Ab. 299. pl. 4. Ibbetson v. Beckwith, Talb. Cas. 157, 160. 2 Equ. Ab. 302, pl. 23. Tanner v. Morse, Talb. Cas. 284. 3 Wms. 295. Scott v. Alberry, Com. 337, 340. 2 Equ. Ab. 301, pl. 19. Wilson v. Robinson, 1 Mod. 100. Barry v. Edgworth, 1 Equ. Ab. 178, pl. 18. 2 Wms. 523. Ridout v. Pain. 3 Atky. 486, 493. 1 Vez. 10. Bailis v. Gale. 2 Vez. 48, 49, 51. Hurst v. Earl of Winchelsea, 2 Burr. 879. 1 Blaŋ Rep. 187. Holdfast *ex dem.* Cowper v. Marten, et al. 1 Term Rep. 411. Fletcher v. Smiton, 2 Term Rep. 656, 660. Loveacres *ex dem.* Mudge v. Blight, and wife, Cowp. 352, 353. Grayson v. Alkinson, 1 Wils. 333. 1 Bac. Supp. 364. Doe *ex dem.* Burkit and wife, et al. v. Chapman, 1 H. Bla. 228. Smith et al. assignees v. Coffin, and wife, 2 H. Bla. 444. Anonymous, 3 Dall. 477. Tuffnell v. Page, 2 Atky. 37, 38. Macaree v. Tall. Ambl. 181. Styles *ex dem.* Rayment and wife v. Walford, 2 Bla. Rep. 938. Thellusson v. Woodford, 4 Ves. jr. 311.

RESPUBLICA *against* the County Commissioners of Philadelphia county.

Mandamus will not lie to the commissioners of Philadelphia county, to pay the salary of the keeper of the gaol.

A statute cannot be repealed by non-user.

RULE to show cause, why a *mandamus* should not issue to the county commissioners, to pay the salary due to Philip Edwards, as keeper of the gaol of the city and county of Philadelphia, and the intestate thereon.

By the act "to reform the penal law of this state," passed 5th April 1790, § 15, it is directed, that the keeper of the gaol with the approbation of any two inspectors, shall provide a sufficient quantity of stock and materials, working tools and implements; for the expense whereof the inspectors shall draw orders, to be countersigned by the commissioners, on the treasurer of the county; and the said keeper

shall cause the accounts to be regularly kept. 2 St. Laws 807. By sect. 17, if any frauds shall appear in such accounts, the particulars thereof shall be reported by the inspectors in writing to the mayor of the city. By § 22, the gaoler shall give bond to the treasurer of the county, in 500l., with two sureties, conditioned for the faithful performance of his trust; his salary was to be paid in quarterly payments, by orders to be drawn on the county treasurer, by the mayor; and his appointment to be by the mayor, two city aldermen, and two justices of the peace. But by another act passed 8th April 1795, § 4, the powers of the mayor and justices, in these particulars, were to be exercised exclusively by the inspectors. 3 St. Laws 773.

The keeper of the gaol claimed a large sum of money, under a settlement with the inspectors, and orders drawn by the commissioners, amounting with interest thereon to the 15th September last, to \$4883 and 66 cents. The object of the rule was to obtain a decision of the court, respecting his claim of interest.

It was objected in behalf of the commissioners, that Edwards had not given an official bond to the treasurer as the laws requires. The party must suggest whatever is necessary to entitle him to the writ. 6 Mod. 310.

He must show that he has right to the remedy prayed for. 4 Burr. 2191. It must appear, that he has complied with all the necessary requisites to give him a *prima facie* title. 3 Term Rep. 575.

As to the exception, it was proved, that Edwards first acted as an assistant keeper, and in the latter end of 1798, was appointed principal keeper of the gaol, by the inspectors. The funds of the institution were then low, and the inspectors were obliged to borrow money for the public use. The board agreed, that if he would permit the money due to him, to remain in their hands, it would be an adequate security, and they would pay him interest therefore. This was mutually agreed upon by the inspectors and Edwards.

It was then objected, that the rule should have been taken on the inspectors of the gaol, and not on the commissioners. The inspectors are to draw the orders by law, and the powers of the mayor, &c., are now vested in them. A mandamus only lies to the party bound to do the act. 2 Term Rep. 232.

Hereupon it was shown, that by an arrangement made between the commissioners and the inspectors, the former were allowed to draw the orders on the treasurer, in order to make the appropriations to meet the disbursements. The proposition came from the commissioners, and was acceded to by the board of inspectors, as a reasonable measure. The practice has been con-

formable thereto since 1800, and in fact, nine orders for quarters salaries had been signed by the county commissioners in favor of Edwards, on which the present rule was obtained.

To this it was answered, and so resolved by the court, that the agreement of the commissioners and inspectors is a mere nullity, so far as it contravenes the act of assembly. The court must see the law carried into execution, notwithstanding a practice may have prevailed against it. A statute cannot be repealed by non-user. 2 Term Rep. 275. It would be an arbitrary assumption of power in the court, to require by their writ, an act to be done by the commissioners, which, if the law warranted, it must be done by other persons, by express words.

Rule discharged.

Messrs. E. Tilghman and Hopkins in support of the rule.

Mr. M'Kean for the commissioners.

**BENJAMIN LEEDOM *against* PHILIP PANCAKE and REBECCA his wife
late REBECCA HOPKINS.**

Rule to show cause, why a new trial should not be granted on the ground of the party being unprepared at the trial, denied.

MOTION for a rule to show cause, why a new trial should not be granted. The cause was tried at Nisi Prius, at the last sittings, when a verdict passed for the plaintiff. The action was founded on a debt of the defendant's wife before marriage, which was chiefly proved; and the only question on the trial was, whether the defendants were husband and wife or not. One Richard Hunt swore, that he was casually present in the defendants' house, at the time of the wedding dinner, though not an invited guest. The defendant introduced Rebecca Hopkins to the company as his wife, and one of them saluted her as such; he acknowledged her as his wife and called her by that name. They lived together, and he heard her called Mrs. Pancake at least one hundred times. She was generally reputed to be his wife.

Mr. S. Levy for the defendant read several affidavits taken since the trial, tending to show, that the woman came to the defendants house under the character of a housekeeper at certain stipulated wages and that they both said so; and that he had left his place of abode shortly before the trial. He insisted, that the general reputation had been proved by a single witness only, not the best character, who was accidentally present at the time of the supposed wedding dinner. None of the original guests had been examined, who might clearly have

shown the fact of marriage, if it really existed. The cause might be of great consequence to Pancake, against whom other suits might be brought on the same ground. In fact, fifteen such actions had been instituted against him, and this verdict would have a decisive influence in those causes. Evidence from cohabitation and reception by the party's family, as man and wife, is admissible *prima facie* evidence of marriage to go to the jury; but it might be repelled by other proof. 1 Espin. Rep. 214. This was a proper case for the court to interpose its discretion, and grant a new trial.

Mr. Condry for the plaintiff urged, that all this proof of housekeeping ought to have been laid before the jury on the trial. Pancake knew the ground on which the suit was founded, and should have been prepared with his defence. If the supposed wedding dinner was capable of explanation it ought to have been explained at the time; and he might have subpoenaed, his witnesses to give evidence of what had passed. Indeed, the reputation of the witness for the plaintiff had not been attacked on the trial. If it had so happened, witnesses might have been adduced to testify in his favor, in a regular mode of proceeding. It will not be denied, that the evidence which went to the jury was correctly legal. The case which has been cited, fully proved it and Harvey v. Harvey, 2 Bla. Rep. 877, is mentioned therein, which establishes the same rule of evidence. A jury may infer a marriage from cohabitation, reputation, and other circumstances. Morris v. Miller. 4 Burr. 2053. 1 Bla. Rep. 632. S. C. If the court would grant the rule under the circumstances of this case, it will encourage every person who comes unprepared to make motions of the same nature.

.Shippen, C. J. was of opinion the rule should be granted; but the other members of the court dissented therefrom.

Motion denied.

JAMES and JOHN W. BAKER for the use of ISAAC HAZELHURST and Son *against* ANDREW C. SMITH.

ISAAC HAZLEHURST and Son assignees of JAMES and JOHN W. BAKER *against* ANDREW C. SMITH.

Erroneous teste of *fi. fa.* by clerk, tho' executed, is amendable.

On a judgment had in *erm.*, a *fi. fa.* cannot issue returnable to the last return day of the term, tho' goods are only to be levied thereon. Aliter of formal fictitious writs, which may be filed of course.

RULES to show cause, why the executions issued should not be set aside, and restitution awarded; and that the plaintiffs should be restrained from issuing further executions, without leave of the court.

The bond on which judgment was entered up in the first action, on the 1st August 1804, was conditioned for the payment of \$7836 and 77 cents on the 29th December 1804. A *fieri facias* was taken out on the 5th October preceding; returnable on the 4th December 1804, being the first return day of the term, upon which the defendant's store goods were levied. On an application to the chief justice in the vacation, he ordered the execution to be stayed, until the December term. This bond after the judgment, on the 22d September 1803, was assigned to Isaac Hazlehurst and Son.

The bond in the second action was given for the like sum, on the 22d September 1804, though it bore date on the 2d July preceding, and was payable on the 27th September following. Judgment was entered up thereon on the 7th December 1804, after the term had begun, and on the next day a *fi. fa.* issued, tested on the 15th September 1804, the last day of the term, returnable on the last return day of December term, being 29th December 1804.

It appeared on the examination of witnesses, that the goods which were the consideration of the first bond, were originally contracted for on the 14th June 1804, by Robert Barret and the aforesaid Andrew C. Smith, payable by their notes in 6, 7, 8, 9, 10, 11, and 12 months, and secured by a mortgage on a country seat of Barret. It was afterwards discovered, that there was an incumbrance on the lands intended to be mortgaged, and the first agreement was cancelled. On the 29th June the goods were sold to Smith, payable in notes from 6 to 12 months, for \$9736 and 77 cents. The repairs of a store \$100, were added thereto, and a credit of \$2000 being given for cash and notes drawn by Burton Wallace, payable from 6 to 12 months, the debt was reduced to \$7836 and 77 cents, for which the first bond was given.

On the 22d September, Samuel Hazlehurst told Smith he was afraid that Barret would injure this concern, having given several notes for

the payment of his private debts. He proposed the giving of a new bond and warrant, and making it payable immediately; Smith was induced to give the second bond, under Hazlehurst's promises to befriend him and assist him with goods and money. This bond was to be made use of in case of danger, if things went wrong; but this as one of the witnesses swore referred particularly to Barret. It was agreed at the time that Smith should give his notes for \$500, payable every thirty days, the first payment thereof to be made in 90 days, in discharge of the bond. This agreement was to be reduced to writing by the attorney of Hazlehurst, but it was not done. On the 2d October, Smith got a small bale of goods of Hazlehurst and Son, to the amount of 200 dollars, and afterwards purchased of a Mr. Lancaster 1800 dollars worth of goods, in addition to his stock.

According to the testimony of the defendant's clerk, merchandize to the amount of \$10,433 and 63 cents at prime cost, remained in the store when the sheriff levied. Until that period the defendant went on with his sales, making a profit of near 25 per cent. The goods on hand would have averaged a profit from 10 to 30 per cent., except the article of fans, of which there was a considerable quantity. But one of the city auctioneers estimated the value of all the goods on hand, at their auction prices, to be no more than \$5000.

The sheriff swore, that the first execution was levied, immediately after it came to his hands, and the defendant's store was then locked up. The goods were afterwards removed to save the high rent of the store, and arrangements were made to sell them in the most advantageous manner. Orders were given to him to sell for two instalments due 1st January and February 1805, and goods assorted to the market were sold exceeding 1100 dollars at auction, at their full value. Another sale was directed for the instalment of 500 dollars, due 1st March, but the sale was stayed by the order of the court.

The court desired the counsel, who were to show cause, to confine their argument to the legality of the execution issued in the second action. It seemed impossible to justify the first execution, either on the ground of the day of payment specified therein, or of the instalments agreed upon on the 22d September. That execution was taken out on the 5th October 1804.

The counsel for the plaintiffs then relinquished their first execution. They were willing to give any reasonable delay; all they asked was to be secured in their just demand, of which they would be wholly stripped if the defendant's rule was made absolute.

The case divided itself into two questions. 1st. Was the second execution irregular, and on that ground, to be set aside? 2d. If it was irregular, would the court award restitution and impose terms on the plaintiffs?

I. As to the teste of the execution issued on the 8th December, it was the act of the officer of the court. The *præcipe* of the attorney only pointed out the day of the return. The teste is a mere fiction. In a variety of instances, it necessarily must precede the judgment. There is *veritas legis et veritas facti*. The teste of the writ must be of the term, although the writ was prosecuted afterwards. T. Jones 150. The true time of issuing a writ is always inquirable into. If the teste is vicious, point out another day, and it shall be set right. This is a correct rule. It is laid down in the English cases, that as between the parties, an execution binds from the teste; but it is highly questionable, whether this position be correct here. A *fieri facias* binds from its delivery to the sheriff. 1 St. Laws 641. But if there has been any irregularity in the teste, it may be amended as the mistake of the clerk. A bill of Middlesex filed of record may be amended agreeable to the truth. There is a distinction between amending those mistakes, which are occasioned by the act of the party, and of the clerk. 1 Term Rep. 782, 783. A clerical mistake may be amended in the return to a mandamus, after the return has been filed. Doug. 130, (135.) A verdict may be amended by the judge's notes. *Ib.* 362, (377.)

Lord Mansfield then says, it was impossible to believe there was such an absurdity in the law, as that the mere mistake of the officer should be without a remedy. A *ca. sa.* may be amended even after it has been executed. 2 Bla. Rep. 836. 2 Term Rep. 737.

Why might not this *fi. fa.* be made returnable on the second return day of the term? There is a marked difference between judicial and *mesne* process as to the days of their return. An execution need not be made returnable the term after it issues; but there may be an intervening term between the teste and return. But it is otherwise as to *mesne* process in personal actions. 1 Crompt. Pract. 865, 2 Salk. 700. 2 Ld. Raym. 775. The practice however is uniform with us to issue original process returnable on the last day of the term. No ground of distinction can be pointed out unfavorable to our argument. The legislature make no difference, but declare, in order to obviate delays and inconvenience, "that the last day of every term shall be a common day of return for all process, original, *mesne* or judicial; and that the writs and process returnable on the last day of the term, shall be as valid and effectual in all cases, and to all intents and purposes, as if the same had been made returnable on the first day of the

term." Act of 18th April 1795, sec. 2. 3 St. Laws 770. More general or comprehensive language could not be made use of to legalize such a proceeding as the present. It is true, in *Ewing v. M'Nair*, 2 Dall. 269, the court declined giving any opinion as to the effect of taking out a *ca. sa.* returnable to the second return day in order to charge special bail, or of a *fi. fa.* with like return, whereon lands might be levied within the county, and afterwards sold on a *venditioni exponas*, returnable on the first day of the following term. They had determined before that a term must intervene before a testatum could issue; 1 Dall. 334, and here they resolve, that on a judgment of September term 1796, a *fi. fa.* might be minuted on the roll, as made returnable on the last day of that term, whereon to ground a testatum *fi. fa.* to another county, returnable on the first day of the next December term, in order to levy upon lands. In this instance, twenty-one days intervened between the time of issuing the execution and the day of its return. Matter of substance is at least equal to fiction. It could be of no moment to the defendant, in the case of goods levied, whether the *fi. fa.* was made returnable to the last day of December term 1804, or to the first day of the present March term 1805. In either case the sheriff might sell the goods immediately after advertising them: and this consideration forms an important difference between goods and lands levied.

II. The inevitable consequence of the court's awarding restitution, if the execution *stricti juris* should be deemed irregular, must be the loss of the debt. The court have a discretion in this particular, and will not summarily interpose their authority unless injustice has been clearly done. The point is new and not free from doubt. The suitor's remedy has not been accelerated by his issuing the execution in the present mode. If the defendant has been injured, he has his remedy by action, and will recover damages proportioned to the wrong he has sustained. On the 22d September, he acquiesced in the plaintiff's right to an immediate execution. It will be said that a parol contract intervened, and controled this right. Parol evidence will not be permitted to vary a written agreement. 3 Wils. 275. Why was the new bond made payable in five days, if the creditors were to wait for the first instalment of 500 dollars until the 1st January? Why was the bale of goods added to the original debt, unless the payment of the debt was intended to be accelerated? In no stage of the business does there appear any violation of good faith on the part of the plaintiffs, or of the obligees.

The counsel in support of the rule observed, that though the plaintiffs had acquiesced with the court's opinion that the first execution was wholly unsupportable, yet it was of importance to

consider the effects of it. All the store goods of the defendant had been levied no prematurely, locked up and removed, until the second *fi. fa.* issued on the 8th December. The chief justice had, by his order in the vacation, stayed proceedings until the court; and it was most highly improper for the plaintiffs to take out an execution on the second bond given for the same debt, while the matter remained *sub-judice*.

The second *fi. fa.* was irregular, both as to its teste and return. A judgment entered in any part of the term or subsequent vacation, relates, back to the first day of the term. 7 Term Rep. 21. 1 Ld. Raym. 696. The second judgment was confessed after the term had commenced, and the declaration could only have been entitled of December term 1804. The process on it should therefore have been tested on the first day of that term; or, as it issued in term time, on the day whereon it was made out, according to the usual practice. The testing it on the 15th September preceding was a perfect novelty. But the error is now rolled on the officer; and it has been contended, that considering it as his act, it is amendable. But this cannot be done without fully paying the costs thereof.

The intention of the act of 18th April, 1795, is expressed to be, to prevent the delays and inconvenience which arose from the want of a second return day in the Supreme Court in each term, as well in the commencement as in the prosecution of suits. Before the act passed, a court was lost in many instances, where technical rules of law were to be pursued. It was designed thereby, that the party should elect whether his process should be made returnable to the first or last days of the term, not that on a judgment obtained during a term, lands might be sold within a fortnight afterwards, or special bail made chargeable within that short period. But the law only holds in cases of election. Previous thereto, on a judgment with a cesset until next term, a *fi. fa.* might be filed returnable to such term, whereon to ground a *testatum*. The act was meant to accelerate the proceedings, were to preserve consistency in the law, time must be allowed to file a fictitious writ; as in the case of *testatum* executions, or writs of *distringas juratores* founded on supposed *venire facias*'s. In December term 1796, the court adopted this difference between real and fictitious writs in *Ewing v. M'Nair*, and the uniform usage of this court has been conformable thereto, in cases of judicial process. When goods are levied upon, an execution returnable at a short day, certainly urges the sheriff to sell immediately.

It is not denied, that original process often issues to the second return day of the term; but it is obviously founded in error, where the party had no election. To say the most of it, the

only ground on which it can rest, is the cotemporaneous exposition of the act practiced under, above nine years, and which is now become the evidence of right.

On the 14th June the goods were sold to Berret and Smith, who were to give their notes therefor, payable from six to twelve months. That contract being rescinded, a new agreement of the same nature was made with Smith on the 27th June, and allowing for the three days of grace, the first note would not be payable, earlier than 1st January 1805.

The first bond must have been understood as subject to those terms. The second bond was controlled by the collateral agreement of payment by instalments. No danger was contemplated except as arising from the conduct of Berret. The defeasance to the bond was to have been drawn by the attorney of the plaintiffs; and it must be considered as if executed and notes given under it. This agreement must evidently have been designed to shelter the defendant from the rigour of the plaintiffs. The former, if possessed of one ray of reason, could never have intended to surrender himself wholly to the latter, and submit his credit, the liberty of his person and his property in the store, altogether to their pleasure. But the plaintiffs, by a most unwarrantable proceeding, have locked up his store on the 5th October, upon a bond not payable until the 29th December following, when no instalment is pretended to be due.

Fraud may arise from the subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand; and as no honest or fair man would accept on the other. The common law takes notice of such inequitable and unconscionable bargains. And fraud may also be presumed from the circumstances and condition of the parties contracting. 1 Fonbla. 114. If there be such inadequacy of consideration, as to show that the person did not understand the bargain he made, or was so oppressed, that he was glad to make it, knowing its inadequacy, it will show a command over him, which may amount to a fraud. *Ib.* 118. 2 Bro. Cha. Rep. 175. For the cases which an injunction will lie, to stay proceedings at law, see 2 Harr. Cha. Pract. 222-3. It lies when a bond has been sued, contrary to agreement. 2 Com. Dig. Cancery, D. 8, pa. 48, (223, pl. 9) A bond and covenant shall be taken as one agreement, and construed together. 2 Vern. 519 An injunction in general lies, to restrain any injury and mischief not easy to be repaired: 1 Woodes. 206.

The court will judge, whether the necessary consequence of pronouncing the second execution to be irregular, is not an award of restitution; 2 Bac. 739, Execution P, 2 Tidd. 748, Cro. Jac. 246, Barnes, 196, 207; or if they should be of opinion that this

is discretionary with them, whether the circumstances of the case as disclosed in evidence, do not fully warrant their interposition, and authorize the making of the whole rule absolute.

Shippen, C. J., did not attend the argument, and therefore gave no opinion.

Yeates, J. It has been admitted, that the execution which issued on the 5th October in the first action, cannot be supported. On the face of the bond the money was not due until the 29th December, nor was any part of it payable until January following, under the parol agreement of paying it by instalments. Besides, the bond on which the judgment was entered, was surrendered to the defendant, before the execution issued; and a new bond was executed payable on the 27th September. On both grounds therefore, the first *feri facias* clearly cannot be maintained.

The greatest difficulty rests on the regularity of the second execution, at the suit of Hazelhurst and son, issued on the 8th December, upon the judgment entered up on the preceding day, returnable to 29th December 1804, being the last return day of the term.

I do not take into consideration the teste day of this *fi. fa.* Because if it was erroneous merely in this particular, it being the mistake of the officer without special directions, it may be amended, according to the authority of many cases. The strength of the objection is, that the judgment being confessed of December term, after the court had begun to sit, no real execution could issue, returnable at an earlier day than the next March term.

The plaintiff's counsel have contended, that the general words of the act of 18th April 1795, comprehend this case. It extended "to all writs original, *mesne* or judicial process or other proceeding, which might be made returnable at the election of the party suing out the same," &c. They assert, that it is the uniform practice to issue *mesne* process, after the term has commenced, returnable on the last return day of the same term; and that no distinction can be drawn from the expressions in the act, between *mesne* and judicial process. On the other hand, it has been insisted, that the issuing of *mesne* process in such cases was a common error, which having prevailed for nearly ten years, was mellowed down into evidence of right, and could not be attended with any bad consequences; but that *stricti juris*, the practice ought to have been restrained to cases, where the party had an election, to make his process returnable to the first, or second return days.

Ewing et al. v. M'Nair, 2 Dall. 269, has been cited on both

sides, determined in December term 1796. According to my note of that case, the court declared, "that where the filing of writs was merely formal, as in the matter then before the court, of filing a *fi. fa.* whereon to ground a *testatum*, or of a *venire facias* whereon to found a *distingas*, in order to accelerate a trial, no injury whatsoever could arise from making a *fi. fa.* or *venire*, returnable on the second return day of the term. But the adoption of the same practice, as to suing out a *ca. sa.* whereon to charge a special bail, or a *fi. fa.* to levy lands, whereon a *venditioni exponas* might immediately issue, required more consideration; as these did not appear to be the delays and inconvenience intended by the legislature, to be remedied by the law of 18th April 1795." Salk. 589. 2 Barnes, 169, 171, 174. 1 Barnard. B. R. 392. 2 Tidd. 743.

The court thus early distinguished between formal fictitious writs, which might be filed as matters of course, and real writs, which required the effective services of the ministerial officers. But it has been urged, that no serious evils could arise in the present instance, the *fi. fa.* being levied on goods; and that though the *fi. fa.* had been made returnable on the first day of the March term ensuing, the sheriff might sell on the delivery of the writ, after duly advertising the personal property. It will not be denied, that the *fi. fa.* being made returnable at a short day, necessarily quickens the sheriff's pace. If the present execution can be maintained, even considering its teste to be amended, the consequence must be, that on every judgment obtained by confession, or on a verdict during the term, an execution against the body, or lands and goods of the defendant, may immediately issue to the last return day of the term, which the majority of this court conceive, was never contemplated by the law of 1795. We are fortified in our opinion, by the sentiments of the court, expressed in *Ewing et al. v. M'Nair*, and the uniform practice of the bar. Attentive as those gentlemen are to their client's interests, this is the single instance, wherein an effective execution has been issued to the second return day of the term, on a judgment entered up the same term. It is strong evidence of their sense of the practice.

We have been called upon, to award restitution of the monies and effects levied, and under the circumstances of this case to impose terms on the plaintiffs.

This applies to the legal discretion of the court.

We are not insensible to the harshness of the measures pursued by Mr. Samuel Hazelhurst, in levying on all the goods of the defendant, by an illegal execution, and locking them up from the 5th October, while interest was running on upon the second bond: but we also know, from what passed during the argu-

ment, that if the amount of sales is restored to the defendant, a probable if not certain loss will be incurred by the plaintiffs. Besides, the terms of the act are not sufficiently clear and precise, to exclude reasonable grounds of doubt, on its true construction.

Under these impressions, we do not think ourselves warranted to interpose the summary powers of the court, as prayed for by the defendant's counsel; but find ourselves constrained to leave the party injured to his remedy at law by an impartial jury. At the same time, we flatter ourselves that the distressed situation of the defendant, and a sense of justice and propriety on the part of the plaintiffs, will induce an early compromise and settlement of this unfortunate business.

Smith J. concurred.

Brackenridge J. I am of opinion, that the first execution was irregular, but not so of the second. I think the second execution is both within the plain words and policy of the second section of the act of 18th April 1795. The shadow follows the substance, and why shall we not pursue the expressions of the legislature, which show best their true meaning? I am decidedly of opinion, that the defendant should have his remedy by his personal action, and agree fully with the sentiments of the court already expressed, except so far as they respect the return day of the second execution.

Executions in both actions set aside, and the rules made absolute so far, but no further.

Messrs. Ingersoll and Rush, *pro quer.*

Messrs. M. Levy and Wilson, *pro def.*

ALEXANDER M'CRAWLEY *against* THOMAS BROWNE SMITH.

No bail in slander or suit for a libel, unless there be special damage, or the charge be of a gross nature.

MOTION to discharge the defendant on common bail.

The action was brought for slanderous words, spoken of the plaintiff as an innkeeper. The words were, "he robs the travelers' horses of their oats, but charge the oats to the travelers." There was also a publication in the Aurora, on the same subject.

Per, cur. Unless some special damage can be proved, or the words spoken charge the defendant with a crime of a gross nature, it

is the course of the court uniformly, to discharge the defendant in slander, on common bail: and the defendant was discharged accordingly.

Mr. T. Ross, *pro quer.* Mr. J. Sergeant, *pro def.*

The Guardians of the Poor of the City of Philadelphia *against*
WILLIAM LAWRENCE.

Where the plaintiff or his attorney deems it necessary to put an officer in the defendant's house to preserve the lien of an execution the withdrawing of him and suffering the defendant to go on as usual with his business, is relinquishment of the execution.

MOTION on behalf of the plaintiffs, to take the money raised by the sale of the defendant's goods, out of court.

It appeared, that an execution had issued against the real and personal property of William Lawrence, as collector of the poor rates, and also of Robert Erwin and Joseph Bispham, the sureties in his official bond, on the 16th March 1804.

On the next day Lawrence pressed the treasurer of the poor to give him a respite for 60 days, but he would only indulge him for two days. On the 22d March, Zaligman Phillips, the attorney of the plaintiffs, directed the sheriff by a note, to raise the money in the most expeditious manner, against all the defendants; and on the same day, the goods were levied on by one of the sheriff's officers, and a schedule of them taken.

On the 26th March, Phillips again wrote to the sheriff, to use all diligence to collect the money. On the 29th March, Bispham gave his note to Erwin for \$1639 and 60 cents, payable in 60 days, who indorsed it to the plaintiffs, and a receipt was given by their attorney for the note, which when paid, was to go to the credit of the duplicate. Previous thereto, when the officer levied on the goods, he placed a person in the house to keep the possession of them. When Mr. Phillips received the note from Erwin, he wrote to the sheriff on the same day to discharge the goods, (or withdraw the execution) as the matter was compromised. This note was not produced to the court, having been mislaid; but two witnesses proved, that they had seen it in the sheriff's office, in the hand-writing of Phillips; but the sheriff's written order to Thomas Fisher, his bailiff, dated on the same 29th March, was produced wherein he directed him "to withdraw the man who is in custody of the defendant's property, it lying at defendants risk. Lawrence will pay him 7s. 6d. per day. The word defendant's, was evidently inserted by mistake, instead of plaintiffs.

In pursuance thereof, the person who was left in the house to keep

possession went away; and Lawrence opened his shop, and followed his business as formerly, until a *fieri facias* issued against him on the 13th April following, and Samuel Pancoast, his surety, at the suit of the mayor, aldermen, and commonalty of the city, for the arrears of other taxes, whereof he was collector.

The goods were levied thereupon and the shop again was shut up; and the goods were sold at public vendue upon the 20th April, and 1st June 1804, under the latter execution.

The contest, to which of the executions the money arising on the sales should be applied, was in fact between Erwin and Pancoast, the different sureties of the defendant Lawrence.

After considerable argument by Messrs. E. Tilghman, M. Levy and Phillips, for the plaintiffs, and Messrs. Hallowel, Porter and J. Sergeant, for the defendant, the court said, that they had heretofore declared their opinions in several cases, that by the practice of Pennsylvania, the plaintiff did not lose his lien on a *fi. fa.* by the sheriff's not removing the goods levied upon, unless their continuance in the defendant's possession, led to a false credit and injured third persons. The practice was different in England, which it seems has been adopted by the Circuit Court of the United States, for this district. It is there held, that the goods of the defendant must be removed to a place of safe custody in a reasonable time, otherwise the officer who was placed in the house would become a trespasser; and the late practice in this city is said to be conformable thereto. Such appear to have been the sentiments of Mr. Phillips, the plaintiff's attorney on the present occasion; and if he and the sheriff judged it necessary, in order to preserve the lien of the first execution on the goods, to keep an officer in the defendant's house, the withdrawing of him afterwards, and suffering the defendant to go on with his usual business, must be deemed a relinquishment of the effect of that execution. That point being established to the satisfaction of the court, the motion must be denied.

The plaintiff's counsel cited Chancellor v. Phillips, Cummins v. M'Dougal, Levy v. Wallace, and Swift et al. v. Kantner, decided in this court.

The defendant's counsel cited 1 Wils. 44. 1 Vez. 245. 2 Bla. Rep. 1218. United States v. Cunningham, decided 26th May 1802, in Circuit Court of U. S., and Barners v. Billington, April 1803, in same court.

JOSEPH WELCH *against* ARCHIBALD MURRAY.

He who complains of irregularity, should early apply to the court. Sheriff's sales of life estates in lands, will not be readily set aside.

ON a *venditioni exponas* returnable to September term 1804, one undivided sixth part of a house and lot in the city, was returned sold to the plaintiff, during the life of the defendant.

A motion was entered in December term 1804, to set aside the sale, on the ground of irregularity.

The motion was made in behalf of Joshua B. Bond, a creditor of the defendant, but who had obtained no judgment against him. He was supposed to be in a distant part of the state, and was entitled to the property in right of his wife.

It appeared that the premises were duly advertised for sale, on the 13th July 1804. Adam Clampfer the sub-sheriff, was directed to attend the sale, but omitted it in the hurry of business. The sale was adjourned to a period within ten days, and was not again advertised. A fair sale then took place. Bond did thereat, but the plaintiff was the highest bidder: and in consequence thereof, paid off a prior judgment.

Mr. Wallace for the plaintiff, took several exceptions to the motion. 1. The application is not made by the defendant, or any authorized agent in his behalf. Bond has no lien on the premises; he made no objection to the sale at the time, but actually bid thereat. A complaint from him of inadequacy of price, under such circumstances, will not be respected.

2. If it is competent to him to object, he ought to have come forward in due time. In all cases of irregularity, the party should apply to the court as early as possible, and if he either proceeds himself after discovering the irregularity, or lies by, and suffers the other party to proceed, the court will not assist him. 2 Tidd. 271. 3 T. R. 10, 5 T. R. 254. 264. Here he has been faulty in both particulars.

3. Here a life estate only has been sold; and the estate may run out before a second sale, which would be prejudicial to all parties.

Mr. W. Tilghman in support of the motion. Bond is a creditor, and of course interested. But even a stranger may suggest to the court a gross irregularity in a sheriff's sale. It is impossible there can be an adjournment, when the proper officers did not attend according to the advertisement. It is the same thing in this instance, as if the premises had never been advertised before. We come in early enough with our objection, at any time before the acknowledgment of the sheriff's deed.

By the court. Unquestionably there has been irregularity ; but the delay in the application of Bond, who bid at the sheriff's sale, and suffered the plaintiff to discharge an earlier lien on the property, and the nature of the estate sold, forbid us to interfere. The interest of the defendant may cease before a second sale, or the premises may not be sold again for the same sum. We have no proof of inadequacy of price.

Motion denied.

JOSEPH WELCH *against* ARCHIBALD MURRAY.

[S. C. 4 Dall. 320.]

As between creditors, the priority of their judgments is governed by the times of their entry, and not by relation to the preceding term.

A CASE was also filed for the opinion of the court, on a rule to bring into court, the money proceeding from the sale made by the sheriff.

On the 29th July 1798, the defendant, Murray, executed to the plaintiff, Welch, a bond in the penalty of 2500 dollars, with a warrant of attorney to confess judgment ; by virtue of which warrant, judgment was signed in the Supreme Court infavor of the plaintiff against the defendant, on the 7th August 1798, for the penalty of the bond. The declaration was entitled, and the judgment entered as of the preceding March term.

On the 2d August 1798, the defendant executed to Catharine Ewing, a bond, in the penalty of 240 dollars, with a warrant of attorney to confess judgment ; by virtue of which warrant, judgment was entered in the Court of Common Pleas, for the said Catharine Ewing against the defendant on the 3d August 1798. The declaration was entitled, and the judgment entered as of the preceding June term.

Welch took out execution, and sold the defendant's real estate ; and the proceeds being insufficient to satisfy both judgments the question for the opinion of the court is, whether the said Catharine Ewing is entitled to be paid the amount of the judgment by her entered, before payment is made to the said Welch ?

Mr. Wallace for the plaintiff, Welch. The only question is, which judgment has the priority in law ?

Judgments at common law, between subject and subject, relate no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor. And now by the statute of frauds, 29 Car. 2, c. 3, the judgment shall not bind the land in the hands of a *bona fide* purchaser, but only from the time of signing the same. 3 Bl. Com. 420. At common law, every judgment in vacation, relates to the first day of the preceding term. A statute acknowledged on the

22d Jannary between the *essoïn* day and the first day of full term, was postponed to a judgment confessed on the 23d Jannary. *Stanford v. Cooper*. Cro. Car. 102. S. C. Hutt. 95. S. C. Helt. 72. S. C. 14 Vin. 616, pl. 6.

Every judgment entered before the *essoïn* day of a term, is of the term precedent: but if entered after the *essoïn* commenced, it is of the present term. 12 Mod. 519. 6 Mod. 191. Yelv. 35. Unless the contrary appears of record. 3 Burr. 1596. The reason is given for this relation. The term and vacation are considered as one day. 1 Wils. 39. Lord Porchester's case is mentioned by Buller J. in 1 T. R. 117. There were two judgments; but as they both referred to the same day, the court held, that the priority of one could not be averred.

Judgments are good by relation, though the defendant died before actual signing. *Northern v. Oliver*. 2 Barnes 265, (266, new edit.) *Hall v. Morse*, 2 Barnes 208, (267.) *Savil v. Wiltshire*. *Ib.* 212, (270.) *Fawkes v. Atkinson*. *Ib.* 209, (268.) S. C. Willes, 427. The reason given is, that all judgments are taken to be pronounced in term time. And so far has this principle been carried, that where a rule had been made to permit a judgment to be entered on an old warrant, the court refused to discharge the rule, though the party was dead at the time it was made, on the ground that *quod fieri non debet, factum valet*. 2 Stra. 1081. *Chancey v. Needham*. The Court of King's Bench were lately called upon to examine the propriety of the rule, that a judgment in vacation should relate back to the first day of the term. But Lord Chief Justice Kenyon said, the court were bound down by the current of authorities, all speaking the same language. 6 T. R. 24.

The British statutes of 29 Car. 2 c. 3, obviates some of the hardships which may be supposed to attend the rule, that judgments relate to the first day of the term, sect. 13, 14, 15. Our act of 21st March 1772, pursues the same language, when it provides in sect. 3, that "judgments as against purchasers *bona fide* for valuable consideration, of lands, tenements or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be signed, and shall not relate to the first day of the term whereof they were entered," &c. 1 St. Laws 641. The English books are filled with authorities, that the statute of frauds concerns only purchasers and not creditors; as to creditors, the effect of judgments remains as it was at common law. *Robinson et al. v. Tonge et al.* 3 Wms. 398. 2 Equ. Abr. 259. pl. 16. 454, pl. 14. *Finch v. Earl of Wilchelsea*. *Ibid.* Note. *Order v. Woodard*, 1 Salk. 78. 7 Mod. 93. 2 Lord Raym. 766, 849.

Duke of Norfolks case, 7 Mod. 39. 1 Salk. 401. 1 Saund. 219. Williams's note. 2 Saund. 9. Fuller v. Jocelyn. 2 Stra. 882.

The principle of the technical relation of a judgment to the first day of the term, as between different creditors, has in fact been recognized in this court on full argument in Hooton v. Will, 1 Dall. 450. There it was determined that the plaintiff's judgment entered on the 16th September, related back to the 4th of the same month, the first day of the term, so as to exclude a domestic attachment which issued on the 5th of the same September.

The reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term, is, because the fact is not relevant: the legal consequences do not depend upon the truth of the fact, but upon the rule of law, that judgments shall be deemed complete, and bind to all intents and purposes by relation. 2 Burr. 967.

It may be objected, that the usage which has obtained amongst sheriff's as to paying off judgments according to their priority in point of time, shows the opinion of the profession on this subject; but the usage of a particular office cannot prevail in the decision of legal questions; usage to grow into a law, must be a general usage, *communiter usitata et approbata*. 3 Burr. 767. Even mercantile usage cannot control the settled law, nor should it be received for that purpose. 2 Burr. 122. Innovation ought not to be made; but precedents should be followed, unless they are flatly unjust, and contrary to reason. 1 Bla. Com. 69.

The law cannot receive its cue from the hardship of particular cases. It must not vary according to abstract notions, either of right or convenience. But fiction works no wrong in the present instance, both debts are equally meritorious, and Welsh's obligation precedes in point of time.

Mr. Rawle in behalf of Mrs. Ewing, observed, that in many particular, our laws differ from those of England. There statutes take effect from the first day of the sessions of parliament; but it is not so here. There lands cannot be sold for the payment of debts; here they may be sold. 1 St. Laws 67. Our local situation demands in many instances a departure from British customs. Sheriffs and other ministerial officers have uniformly been governed in the distribution of monies arising on the sales of lands, by the times of entering the judgments, without the smallest respect to the terms of which the declarations were entitled, or to which the judgments were supposed to relate. We have the certificates of three sheriffs, which fully show their practice in this particular; but we have little occasion to use them, as every judge and gentleman of the profession must be well informed on

this point, from their own experience. That a judgment entered on the 7th August 1798, should be preferred to one entered on the 3d of the same month, merely on account of their being confessed in different courts, the first day of the preceding term in the Supreme Court over-reaching that in the Common Pleas, would be a novelty in Pennsylvania. Welch seriously applies to exclude the prior lien fairly obtained by Mrs. Ewing !

The entry of the judgment was by an act of the party ; the fact is relevant, and proof may be received, to show the truth. 2 Burr. 959. The court will not endure, that a mere form or fiction of law introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing ; and they have (for 150 years) uniformly held, that where it became material to distinguish, they would consider the day when a writ was taken out, as the substance, and the teste as the form. *Ib.* 962, 964.

The court therefore are not precluded from inquiry into the times of entering judgments. They appear on record, and according to the expressions of Lord Mansfield, quoted from 3 Burr. 1596, a judgment relates to the *essoir* day of the term, unless the contrary appears on the record. What inconveniences must result from this inquiry into the truth being prevented? Every judgment entered in the Court of Common Pleas between the first days of the present March term, and of the next term in September, will be over-reached and defeated by a judgment entered up in this court, two days before the next September term. Every mortgage taken between those periods, will, unless the mortgages are considered as purchasers of the lands mortgaged be affected in like manner. No man can ever be safe who takes a mortgage in the vacation ; and the original jurisdiction of this court and of the Common Pleas of Philadelphia county will be appealed to, in the entry of judgments, according as the first days of the preceding terms in either court shall happen to fall out. These are serious evils, and would justly be deemed innovations on the settled law of Pennsylvania.

Hooton v. Will, which has been cited, was determined differently in the Common Pleas. 1 Dall. 187. But without questioning that decision, it is sufficient to say upon this occasion, that it was not a controversy between judgment creditors, as now exists before the court.

The bulk of the cases cited sufficiently prove, that a judgment may be entered up in the vacation, though the defendant be then dead, if he was living on the last day of the preceding term. The reason given is founded on the statute of frauds, which provided only for purchasers *bona fide* for valuable consideration. It holds good, as between the creditors and the represen-

tatives of the deceased debtor ; but as between creditors contending as to the priority of their judgments, it is otherwise. Judgment creditors are considered as purchasers for valuable consideration to many purposes ; and in this state, where lands are subjected to sale to pay the debts of creditors, the rule peculiarly holds, that creditors must here be viewed in the light of purchasers *pro tanto*, at least to the same extent as mortgagees, by the policy of our judicial system. Hargr. Co. Lit. 293. b. Powel on Powers. Prec. Cha. 478. It is true, it is said by the lord chancellor, in 3 Wms. 399, that the statute of frauds and perjuries concerns only purchasers and not creditors ; so that, as to creditors, the judgment remains as it was at common law. Thit decree was made. Mich. 1735. But in a former case determined Mich. 1717, anonymous, Prec. Cha. 478, it was decided, that a judgment as between creditors shall have no relation but from the time of signing. A man, the lord chancellor said, who trusted his money on a judgment, was in some sort a purchaser of the land, as he might take out execution and extend the land itself. Relations were not to be favored in a court of equity. If subsequent judgments should have such relation, it would defeat real creditors who trusted to the priority of their judgments, which my lord chancellor thought ought not to be overthrown by a fiction of law.

It is submitted, that this course of reasoning holds with great force, as applicable to the genius of our government, where by the policy of the laws, lands could not only be extended, but absolutely sold on judgments for the payment of debts.

By the court. We feel no difficulty whatever in the determination of this case, but we profess to decide only on the point now before us. The uniform uninterrupted practice in Pennsylvania for more than a century has been, to consider the binding effect of judgments upon lands, to take place only from the actual entry of the judgments. Judgments thus entered, have never been supposed liable to be affected by fictions or relations. This custom has been used and approved since the first settlement of the province, and conduces to safety and security. As between conflicting judgment creditors, the well known rule applied to the truth of the fact as to the entry of the judgments, *qui prior est tempore, potior est jure*, must govern.

Judgment in favor of Catharine Ewing.

GAVIN HAMILTON *et al.* assignees of ROBERT S. STAFFORD *against* THOMAS and JOHN GALLAGHER, surviving parties of JAMES GALLAGHER, deceased.

Particular circumstances will justify motions to set aside reports of referees, tho' exceptions have not been filed thereto in four days after the reports have been filed.

THIS cause had been referred to the committee of the city Chamber of Commerce. On the 14th December 1804, a report was found for the plaintiffs for 210l. 1s, 10d., whereupon was entered judgment *nisi*, *sec reg.* On the 27th of the same month, exceptions were filed to the report, grounded on matters of fact, together with the usual general exceptions, that the report should have been in favor of the defendants, and not of the plaintiffs.

The motion to set aside the report came on at the last December term, when it was objected that the application came on too late, not being made within four days after the report filed and notice thereof, agreeably to the usage of the court. On a motion in the Common Pleas between M'Carty and Craig, the court had refused to hear a motion against a report, when the exceptions had not been filed within the four days, and the practice of this court had become conformable thereto.

The court then admitted the general rule, and compared it to a motion for a new trial. The party could not claim of right, in causes tried at *Nisi Prius*, to be heard, after the first four days of the next succeeding term, in motions in arrest of judgment or for a new trial; but under particular circumstances, where it evidently was made appear to the court that injustice had been done by the verdict, they might legally entertain the motion, and this they conceived to be the English practice. 5 Term Rep. 436, 438.

The defendants' counsel detailed the circumstances, which he thought would justify a relaxation of the general rule; but the court were of opinion that the rule could not be varied thereby.

The report was then objected to, for errors apparent on the face of it, and was continued under advisement.

The argument was resumed this term, when Mr. Ingersoll for the plaintiffs again insisted, that the defendants could not be heard at so late a day. The court had already determined there was no fact disclosed which would render a deviation from the general rule to be proper in this case; and exceptions taken to the wording of the report were subject to the same inconveniences and procrastination as where extrinsic errors were objected to. A rigid adherence to the rule would be the best security for suitors, and prevent much litigation.

Mr. Levy for the defendants insisted, that no rule was so gen-

eral as not to admit of exceptions. If a plain error appeared on the face of the report, for which a court of appeal would be bound to set aside, would this court confirm the report merely because it was not excepted to within the four days? The proposition is too monstrous to be seriously asserted. The court under particular circumstances, will permit a motion for a new trial to be made after the four days are expired. Doug. 162, (171.) So in criminal cases, a new trial may be granted at any time before judgment. *Ib.* 760, (791.) A defendant convicted on a criminal prosecution, cannot of right move for a new trial after the first four days of the next term; though, if it appear to the court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *Rex v. Holt*, 5 Term Rep. 436, 438.

These decisions apply to trials by jury before judges versed in the law, who can report the evidence on both sides: but to make them applicable to reports of referees, the court must necessarily be informed of the evidence.

Per cur. This reasoning is sound. Let the legal exception be stated for our decision.

After some time Mr. Levy abandoned his exception.

Judgment for the plaintiffs.

RICHARD WELLS *against* MAGARET PFEIFFER.

Where mortgaged property has been incorrectly described in the sheriff's advertisement, though the mistake is rectified before the sale, yet if sold at an under value, court will set aside the sale.

MOTION to set aside the sheriff's sale of two houses and lots in the city, on a *levari facias*, to this term.

The mortgaged premises were advertised, as subject to a ground rent of 6l. 10s. sterling per annum. It was found out at the time of sale, that the mortgaged premises were subject only to the ground rent of 3l. 5s. sterling, the whole lot being chargeable with 6l. 10s. per annum, which the ground landlord refused to divide. The true state of the property was fully explained to the persons present, before the sale opened. A number of bidders attended, and Peter Hudson became the highest bidder, at \$1180, and had paid part of the purchase money.

The under sheriff and another person declared, that they thought the premises were sold at a full price: But two others declared, that they heard responsible men say, they would give between 1500 and 1600 dollars, for the houses: and another witness swore, that they were well worth 2000 dollars.

Mr. Hallowell, for the purchaser, contended, there was no ground to set aside the sale, even admitting that there had been an error in the advertisement. The mistake was rectified at the time ; but independent thereof, every reasonable man could calculate a rent charge, when he purchases property incumbered with it. The sale was fair, and many bidders attended. Mere inadequacy of price is no ground for vacating the sale. If the purchaser has had a good bargain, he has a right to the benefit of it.

Messrs. E. Tlghman and S. Levy *ê contra*, urged, that many persons would buy property incumbered with a yearly charge of 3l. 5s. sterling, who would not lay out their money on it, if the rent was doubled. In effect here has been only a parol advertisement of the property. The sale has been conducted under a misapprehension, that the purchaser was buying in for the defendant, a widow ; and it has gone off much under value. We are persuaded, the houses will bring a much better price, if the true state of the property is made known at another sale. And we offer to repay the purchaser, his interest on the sums he has advanced to the sheriff, and also the costs which he has incurred by our opposing the sale.

By the court. The advertisement was incorrect, and the application has been made, as early as it was possible. It is an additional circumstance, that by the weight of the evidence, it appears that the houses have been sold at an under value. Wherefore on the terms proposed by the defendant's counsel.

Let the sale be set aside.

RESPUBLICA *against* LAMBERT SMITH.

An indenture from a negro lad to his master in consideration of manumission from slavery, is void, unless executed within 6 months after his being brought into the state, or such terms agreed on within that time.

Habeas corpus ad subjiciendum, to the keeper of the gaol of Philadelphia county, to bring the body of negro Joseph before the court. The return was, that he was detained under a commitment, as the runaway servant of David H. Conyngham.

It appeared, that the negro was a slave in St. Domingo, the property of a French lady, who intermarried with Peter Boudineau in 1789. They came to Philadelphia, the negro lad forming a part of the family, in the spring of 1793. In the fall of that year, the husband returned to France, leaving his wife in the city.

On the 13th June 1794, Joseph executed an indenture to Madame Boudineau for fourteen years, wherein she covenanted

to learn him the arts of a cook and house waiter which she assigned to Mr. Conyngham, on the 1st April 1795, and followed her husband to France in 1804. The indenture of 1794, was expressed to be in consideration of the negro's manumission from slavery.

Mr. Hallowel for the negro, contended, that he having been brought into this state by his mistress, who came with an intention to reside and settle here, and retained in this state longer than six months, became thereby free to all intents and purposes, under the 10th section of the abolition act of 1st March 1780, (1 St. Laws, 841,) which was explained and enforced by the 2d section of the act of 29th March 1788. 2 St Laws, 586. Having thereby become free, he could only bind himself till 21 years of age, as if his colour had been white. The indenture professed to bind him until he was 28 years old, and would expire 13th June 1800, and therefore he must now be 24 years and 9 months old. In a case similarly circumstanced, between negro Flora and William Meredith, esq., Judge Cōxe decided, that such an indenture was merely void. There is an additional ground of relief. The indenture was made to Madame Boudineau, a feme covert. The covenants on her part being merely void, the covenants on the part of the negro were vacated thereby. This point also had been determined by Judge Smith, between negro *Sanité* and *Emily André*, the wife of *François André*.

Per cur. There is no evidence of any terms being agreed upon within six months after the negro was brought into this state. The indenture was executed here within one year afterwards; and the negro is now near 25 years old. He must be discharged.

PETER BERTHON et al. *against* MATHIAS KEELEY.

Teste and return days of *fi. fa.* executed amended by the *præcipe*.

RULE to show cause why the teste and return day of the *fieri faias* should not be amended by the *præcipe*.

It appeared by the deposition of William H. Todd, attorney for the plaintiff, that the action had been several terms marked for trial, and that on the first day of March term 1804, the defendant's attorney confessed judgment without any stay of execution; that he directed his *præcipe* to the prothonotary generally, to issue *fi. fa.* without mentioning any return day, as was his usual custom, but intending it to be returnable to the then next September term; and that he had entered it in that manner in his own docket at the time: and that the error

arose from the prothonotary's clerk mistaking his *præcipe* and making it returnable on the second return day of March term 1804. Mr. Todd's *præcipe* and docket on inspection, agreed with the statement he had made: and *Shoemaker v. Knorr*, 1 Dall. 197, was cited as a case in point.

Mr. Rawle for the defendant was called upon to show cause: he said he could not object, nor would he consent to the amendment.

Per cur. Let the rule be made absolute.

JACOB CLARK indorsee of WILLIAM HAINES *against* JOHN WELDO.

One shall not be twice held to bail for the same cause of action, unless under very special circumstances.

MOTION to discharge the defendant on common bail.

A *capais* in case had been issued to last term, when the present motion was made, on the ground of the defendant having been arrested for the same cause of action in Newcastle county, in the state of Delaware, to November term 1803, and having entered special bail there in the Supreme Court.

Mr. J. Sergeant for the defendant now renewed his motion, stating his client to be resident in Newcastle county.

All the cases on this head are arranged in *Sellons Pract.* 42, 48. 1 *Tidd* 36, 37. He produced the Delaware record:

Mr. Milnor for the plaintiff, offered to discontinue the suit in the state of Delaware, and declared that orders had been actually given already for that purpose.

By the court. One shall not be twice held to bail for the same cause of action, unless under very special circumstances. No grounds are here shown which can justify the court in varying the general rule.

The defendant was discharged on common bail.

ARTHUR ST. CLAIR, esq. *against* REMPUBLICAM.

A payment by an auctioneer to the Comptroller General, is not valid. It ought to be the state treasurer.

APPEAL from the settlement of St. Clair's accounts, as an auctioneer of the city, on the 9th April 1804.

The following case was stated for the court's opinion.

On the 14th May 1792, the appellant having been summoned by John Nicholson, then Comptroller General, appeared at his office, when an account was made out against him, on which the balance of 1163*l.* 12*s.* 5*d.* appeared due from him to the commonwealth; and payment thereof was demanded. The said St. Clair then paid to the Comptroller General 187*l.* 10*s.*, and the said Comptroller General gave him a receipt for the same, and also entered a credit on the account for the sum of 280*l.* 16*s.* paid before that time (*prout* account and receipt, and also orders of Executive Council.)

The Comptroller General also made an entry in the said account, and in his own diary, that the said St. Clair was entitled to credit for his commission as public auctioneer on the sale of certain public lands and city lots, (*prout* entry.)

In the year 1803, the appellant received from the present Comptroller General, a statement of his accounts settled the 28th August 1790; in which it appeared, that he was then indebted to the commonwealth, in the sum of \$637 and 65 cts. In the examination of the account, he discovered, that the sum of 146*l.* 15*s.* 10*d.* had been twice charged to him by the former accounting officers, and requested it might be rectified. To this the present accounting officers objected, on account of the length of time: but the appellant alleging, that he had no notice of the settlement, and it not appearing from any official evidence, that he had received any notice, the account was opened; the error of the double charge was corrected, and credit given for the commissions before stated: but as it did not appear, that the said John Nicholson then Comptroller General had paid over to the treasurer of the state, the said sums by him received, credit for them was refused.

From this decision, the said St. Clair has appealed; and the questions submitted to the court, are,

1st. Whether the said payments made to John Nicholson then Comptroller General, ought under the circumstances of the case to be passed to the credit of the appellant?

2dly. As from the recent revision and settlement of the said appellant's accounts, it appears, that had they been duly stated in August 1790, he was not then in debt; nor on the 26th February 1789, when he paid to the then said Comptroller General 280*l.* 16*s.*; and should

it be the opinion of the court that the said sum should be repaid by the commonwealth, whether interest should be allowed thereon to the appellant from the 28th August 1790, or from any other and what time?

Mr M'Kean, attorney general for the commonwealth.

It is admitted, that general St. Clair was appointed one of the city auctioneers on the 21st February 1784, and ceased to act as such on the 12th April 1787. The question is, whether a payment made by him to the then Comptroller General is good against the commonwealth?

To form a correct idea hereon, all the laws upon the subject must be taken together in one view.

By the 3d section of the act of 23d September 1780, (1 St. Laws, 865,) the duties of the auctioneers are defined; and they are to settle and pay 1 per cent, of the gross amount of their sales, to the state treasurer.

By the 3d section of the act of 13th April 1782, (2 St Laws, 56,) an additional duty of 1 per cent, is laid on the gross amount of their sales, for the use of the commonwealth; and they are to account and pay over the same to the state treasurer, as directed by the former act.

By the 4th section of the act of 9th December 1783, (2 St Laws, 170,) they are enjoined to render their accounts, every three months or oftener, to the Comptroller General, but to pay the monies to the treasurer, under the penalty of losing their offices for neglect, and their bonds being put in suit.

The act of 19th March 1789, (2 St. Laws, 680,) empowering the appointment of an auctioneer for Moyamensing, enjoins on such auctioneer, all terms and payments required by the several acts to which this is a supplement.

And another act of 27th March 1790, 2 St. Laws 777, empowering the president or vice president in council to appoint two additional auctioneers, in the last section, directs the duties on the sale of goods to be paid into the treasury.

It required a special act of assembly in the case of Edmund Milne, to legalize a payment made by him to John Nicholson, while he was Comptroller General. 5 St Laws 6. But it is well known that the legislature refused a law of the same kind in the case of James Ash, esq.

The department of accounts is confined to the receiving and settling of accounts. The treasurer of the state is alone empowered to receive the public monies, unless an authority is given by a special law for that purpose.

Mr. Rawle for the appellant admitted, that while he was in

office, the payments ought to have been made to the state treasurer; but that the sum in question was paid on the the 26th Februray 1789, when his office ceased. In a republican government there ought to be no distinction of persons. If a payment by Milne was justifiable and valid, so also should it be of Ash and the appellant. The latter was called on as a defaulter under the act of 13th April 1782, § 5. 2 St. Laws 46. The writ directed him to appear in the comptroller's office, and there exhibit and settle his accounts, and pay* the money belonging to the state, of which he was possessed, &c. It is similar to the case of an individual having two agents, wherein the payment to either, would discharge the debtor.

The court declared the appellant's case to be a very hard one, which it was out of power to redress. They were bound by the express words of the different laws to say, that the payment should have been made to the state treasurer, and not to the comptroller general.

Judgment for the commonweath.

* See the last clause of this 5th section, wherein it is said, they shall pay over to the treasurer, &c. So also in the 6th, 7th and 9th sections of this act.

AT A CIRCUIT COURT, HELD AT LANCASTER APRIL, 1805.

CORAM—YEATES AND SMITH, JUSTICES.

Lessee of GEORGE MOORE *against* JOHN MUNDORFF.

The improver of an island in the Susquehannah, who caveats an adverse right in due time, and immediately after the decision of the Board of Property in his favour, applies for the island, is protected by the act of the 6th March 1793.

EJECTMENT for a small island in the river Susquehanna.

The plaintiff claimed under an application dated 29th May 1794, whereupon an order issued to three persons to view it. They reported on the 17th November following, that the island was susceptible of cultivation and valued it at 4l. per acre.

On the 11th December 1794, George Mundorff entered a *caveat* against the acceptance of Moore's survey, alleging that he had a valuable improvement on the island, and ought to have the right of pre-emption.

On the 8th June 1797, Moore made a second application for the island, asserting it to be then improved and in his possession: and on the 24th August 1802, John Mundorff, in behalf of himself and

the other heirs, of George Mundorff, entered another *caveat* claiming under an improvement made ten years before for the purpose of tillage, and asserting that he had many years previously improved the same as a shad fishery, and had applied for a grant of the island at the time of his entry of the first *caveat*, December 11th, 1794.

On the 13th December 1802, the Board of Property decided that the improvement of George Mundorff, being earlier than Moora's, and the former having never relinquished his claim, but filed his *caveat* in December 1794, wherein he claimed by virtue of his improvements, which claim being made within the time limited by the law of 6th March 1793, the *caveat* of George Mundorff, and the claim of George Moore were dismissed.

On the same day John Mundorff entered a formal application for the island, in behalf of himself and the other heirs of George Mundorff: but this application was not produced in evidence, till the trial was nearly closed.

The chief value of the island consisted in its being a proper place to draw the seine for a shad fishery. Moore in 1795 and 1796 with a party had cleared away some brushes on the island and fished there. He had also a fishery on the eastern shore of the river opposite the premises. But it appeared, that George Mundorff, who lived as a tenant, on an adjacent island called Burkholders, about 12 perches distant, had in 1779 and in the succeeding years, done work thereon by digging down the bank as it washed away, and cutting the brush as it grew up, to fit it for a fishery, and had also cleared out the pool, and fished there occasionally with a company who assisted him in the work, and claimed an interest in the fishery. His cattle were driven in and out of the island by his children. In 1790 he had a small pen inclosed of 10 or 12 yards square, in which he cultivated tobacco, and in three following years, he raised therein Indian corn, turnips and rye, which he afterwards gathered. It was generally known by the name of Mundorff's Island.

After the cause had been fully spoken to by Mr. C. Smith for the plaintiff and Mr. Hopkins for the defendant, the charge to the jury by Yeates J. was substantially to this effect.

The right set up to this island on each side, is twofold: improvement and application to the land office. As to preparing a pool, or cutting brush to effect a good landing for drawing the seine on an island, it has been objected, that these acts cannot be deemed an improvement which can confer an equitable interest in the land. The position is correct in general; because the act of 6th March 1793, 3 St. Laws, 310, directing the sale of certain islands in the river Susquehanna, provides in the 5th section

that no warrant of survey shall issue for any of the said islands, unless the same is susceptible of cultivation, and therefore the improvements must be made thereupon. But the question may at some time be worth considering, whether when the fitness of an island for the landing place of a fishery, constitutes its chief value, though a very small part of it may be cultivated, the clearing out a contiguous pool and removal of the obstructions of brush from the landing may not be deemed a species of improvement, as it necessarily enhances the value of the soil? We give no opinion on this point, as the case does not need it. If the question shall be determined in the affirmative, then the defendant's claim is several years earlier in point of time than the plaintiff's: but if in the negative, they stand on the same footing in this particular, and the plaintiff is bound to show his superior right, before he can recover. His second application of 1797, calling for his improvement, was misconceived. Old Mundorff actually cultivated the soil of the island by raising tobacco, Indian corn, turnips and rye thereon for four successive years, undisturbed by any one, his little patch being surrounded by a rough inclosure, and did occasional acts of ownership thereon. These acts cost labor, though not a great deal.

The only point to be considered here is, whether the defendants' claim is forfeited for want of an application to the land office in due time.

The law of 6th March 1793, confined the preference to improvers of the Susquehannah islands to the term of two years after the passing of the act; after which period, ~~the right of pre-emption~~ ceased. This term would have expired on the 6th March 1795; but the act of 22d September 1794, 3 St. Laws 636, which was made 5 months and 13 days before the end of the two years, suspended the operation of the former act, as to taking up lands without a settlement and improvement thereon. This suspension was not taken off until 23d March 1802, when an act passed for that purpose, so far as related to the islands in the Susquehannah; add to this last period, 5 months and 13 days, and the term of two years is protracted until the 5th September 1802; so that if either the first or the second caveat would be considered as applications within the true meaning of the first law of March 1793, they both fall within the term of two years. The first caveat was supposed by the defendants to be tantamount to an application, because he recites it as such in the caveat filed after his father's death. It is true, no survey could be made on either of the caveats, nor could a survey have been made on the application without a warrant; but the caveats were assertions of claim, and in my idea were virtually applications for the island. They negative all idea of abandonment when

set up in opposition to an adverse claim, asserting the right to be in the caveators, and persisting in their claim to a right of pre-emption. On this matter, however, the court were divided in opinion this forenoon. It now appears, that immediately after the decision of the Board of Property, the defendant formally applied at the land office for the island, in behalf of himself and the other heirs of his father. While the controversy subsisted before the board, he was stopped from going on to better his title; and as to the plaintiff he cannot be said to have forfeited his pretensions for want of an application. I therefore think the plaintiff is not entitled to recover.

Smith, J. I feared before the court adjourned this forenoon, there would have been a difference of opinion on the bench. As to the *caveats*, I decidedly am of opinion, they do not amount to applications within the true intentions of the act of 6th March 1793. But on the production of the defendant's application of 13th December 1802, for the island in question, I am clear that the plaintiff is not entitled to recover.

Verdict for the defendant.

AT A CIRCUIT COURT, HELD AT YORK APRIL 1805.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JOSEPH GLANCEY *against* JOSEPH JONES.

Sheriff cannot advertise lands for sale, nor proceed to sell, without a *venditioni exponas*, nor acknowledge his deed until the return day of the writ.

EJECTMENT for one equal undivided third part of 75½ acres of land in Newberry township.

The plaintiff claimed under a warrant and survey to William Baxter, one third part whereof became vested in Thomas Armor. A judgment was obtained against him in April term 1782, and on a *fi. fa.* returnable to July term following, the premises in question, with other lands, were levied upon, and an inquisition held thereon and condemned. A *venditioni exponas* afterwards issued thereupon on the 29th January 1785, returnable to April term 1785. The deed from William Bailey, sheriff, to John Brookes, was dated 8th February 1785, and acknowledged at an adjourned Court of Common Pleas on the same day. It recited the judgment, *fi. fa.*, levy, inquisition, and *venditioni*, and that

the premises in question were sold after due advertisements made for that purpose, on the 20th January 1785, to Brookes for 9l. 5s. The interest of Brooks became vested in the lessor of the plaintiff by two other mesne conveyances.

The defendants claimed under a later warrant, on which no survey had been made, nor efforts shown to procure one to be made by Bartram Galbraith the warrantee.

The defendant's counsel before they opened their defence, moved for a nonsuit. The plaintiff by his own showing cannot recover. The sheriff could not legally advertise lands for sale, without having a writ of *venditioni exponas* in his hands. 1 St. Laws 68, 69, sect. 3, 4. He was authorised by such writ to give public notice of the sale; but by a *venditioni* which issued on the 29th January, he could not possibly sell on the same day. The case might be compared to an assignment by the commissioners of bankrupt, which passes no interest before enrolment; a lease made under it, though it was enrolled three days afterwards, is of no validity. Carth. 178. 1 Show. 200. The sheriff's deed could not take effect without an acknowledgment in open court, nor could such acknowledgment be made until the return day of the writ. What was done at the adjourned court on the 8th February was a mere nullity. The injured party could not expect to the sale at an earlier day, and if such a practice was tolerated, the greatest oppressions might be committed without any possible remedy. This point has been determined on solemn argument in Miffin county, in the Circuit Court of May 1802, between Murphy's lessee and M'Clearly and Devinney.

The court said they were not aware how the plaintiff could get over the two objections stated against his title; but they did not feel themselves authorized to direct a nonsuit, if the plaintiff's counsel were disposed to answer. 2 Term Rep. 281. 1 Term Rep. 176.

The counsel having closed their address to the jury, the court gave it in charge, that the title under Baxter was preferable to that under Galbraith. The only question was whether the title of the former was legally vested in the plaintiff. Lands in England cannot be sold by process of law for debt. It has been the policy of this government since the first settlement of the province, to subject real as well as personal property to the payment of debts; but the mode of selling lands by sheriffs is pointed out by our municipal acts, which must be conformed to. The act of 1705 expressly directs, that a *venditioni exponas* shall is-

sue to sell lands, unless in the case of a *scire facias* on a mortgage. Without such writ, the sale by a sheriff is utterly void, and has been so determined. Two acts of assembly have been passed to remedy defects of this nature, the one on the 23d March 1764, 1 St. Laws 440, the other on the 26th March 1785, 2 St. Laws 288, but the language of both acts is confined to cases which happened before those laws were enacted, and is not prospective. They clearly show that a legislative provision was deemed necessary to cure such title. Under what authority could the sheriff proceed to advertise lands for sale, unless by a writ of *venditioni* directed to him? Clearly none. His power is derived from his writ.

It has been urged on the part of the plaintiff, that the jury may presume a writ of *venditioni exponas*, returnable to January term 1785, to have issued; that the sheriff advertised under it, and the sale having been during the court, and the return day passed, a new *venditioni* issued to validate the sale. But there is no room for this presumption, as the facts disclosed in evidence repel it. The sheriff's deed recites the original writ of *venditioni exponas* to have issued returnable to April term 1785, and it is not styled an *alias* in the record.

Another objection occurs, equally fatal to the sheriff's deed. It was acknowledged on the 8th February, seven weeks before the sheriff was to return his writ, and thereby make known to the court what he had done thereon. This is the proper time for persons injured by sheriff's sales, to apply to the court for redress. This is the period of acknowledgment, according to the words of the 4th section of the act of 1705, 1 St. Laws, 69, which "has been heretofore used upon the sheriff's sale of lands." It cannot be dispensed with. A contrary doctrine would open a door to the greatest mischiefs. Such were the grounds of decision in *Murphy's lessee v. M'Cleary et al.* at Lewistown. That case has been attempted to be distinguished from the present, inasmuch as the debtor was one of the defendants. But the distinction does not rest on legal grounds. A plaintiff in ejectment is bound to show a right of property or of possession, before he can turn out the defendant. If the title of Armor has not been legally divested; though he or his heirs are no parties to this suit, the defendant may take advantage thereof.

We are perfectly aware of the feelings and leanings of juries in matters of this nature; but the duty they owe to their country as well as themselves, should induce them to govern their verdict by the known laws. In a state of society, it is much better to submit to a partial evil, than introduce a general mischief.

The jury staid out all night, and the next morning gave a ver-

dict for the plaintiff, provided the sale of the sheriff was valid in point of law. The plaintiff's counsel insisted, that they should find a general verdict. They retired to reconsider their verdict, and in one hour found generally for the plaintiff.

The defendants counsel moved for a new trial. The plaintiff's counsel were only heard thereon.

Per cur. The verdict is against our ideas of the clear law, and the decided charge of the court. In matters of small value, the court will not grant a new trial; but where a verdict has been given against law, the case is otherwise, (1 Term Rep. 171;) for in such instances, a third new trial has been granted. We do not feel disposed to throw any weight against sheriff's sales, and so told the jury. But we are bound as far as we can, to preserve the law inviolate, and to award new trials where its rules have not been adhered to. Both of the exceptions which have been made to the sheriff's deed appear to be fatal. We know of no practice in York county, which sanctions a sheriff's deed, under circumstances similar to the present. But we well know if such practice has prevailed, it is bad in itself, and must lead to the most injurious consequences. No usage can repeal the positive provisions of an act of the legislature. 2 Term Rep. 275. We find ourselves constrained to award a new trial without costs.

Messrs. Bowie and Watts, *pro quer.*

Messrs. Duncan and Hopkins, *pro def.*

AT A CIRCUIT COURT HELD AT HUNTINGDON MAY 1805.

CORAM—YEATES AND SMITH JUSTICES.

Lessee of DANIEL GRIPE *against* Rev. DAVID BAIRD.

A warrant unsigned by the governor, where money has been paid upon it, is good evidence, and confers an authority to survey the lands. A warrant or application, generally descriptive but vague, without a survey, must give way to a subsequent one of the same kind, whereon a survey has been made, or to a precise and accurate one, without a survey. Practice of surveying, 10 per cent. surplus before the revolution.

THIS cause came on again to trial. The dispute was confined to 16 acres in Alleghany township, which took in a small part of the meadow, and the barn, stable and spring house of the defendant.

The plaintiff deduced his title, under a warrant to Samuel Smith dated 3d February 1755, which was not signed by the governor for the time being. But he showed a credit in the books of the receiver general, of the same date for 5*l.* paid on this warrant, for 100 acres in the forks of the North Branch, near the mouth of Beaver Dam, about three or four miles from James Lowrey, in Cumberland county.

The warrant was shown, in evidence without opposition, and it was agreed to be an authority to survey the lands, the party having complied with the contract on his part.

On the 3d December 1774, a survey of 118 acres and allowance was made on this warrant by Thomas Smith, (D. S.)

The defendant claimed under a warrant to Joseph Brown, dated 31st May 1762, for 300 acres on the middle branch of Frankstown creek, between two and three miles from there; on which a survey of 304 acres was said to be made by Richard Tea, on the 25th May 1765, and returned into the surveyor general's office, on the 23d December 1766.

The defendant controverted the plaintiff's warrant, being accurately descriptive of the lands in question, and insisted that it called for lands in distant therefrom two miles. Several witnesses were examined on both sides, as to this point.

On the other hand, it appeared that Tea or his deputy had committed a mistake in making the survey for Brown; and afterwards on the discovery thereof, had extended the lines, and included double the quantity actually the surveyed in his return of survey. His right to extend the lines on paper without an actual survey, was much controverted.

Smith, J., declined giving any opinion, having made the survey under which the plaintiff claimed.

After argument by counsel, Yeates, J. charged the jury, that he knew of but three rules which were applicable to the present case.

1st A plaintiff in ejectment must recover by the strength of his own title. 2d. Where there has been negligence in obtaining a survey, a warrant or location generally descriptive but vague in its terms, must give way to a subsequent warrant or location equally vague whereon a survey has been made, or to a subsequent precise warrant and location even without a survey, where it accurately describes the lands. 3d. Under the order of the Board of Property of the 1st May 1767,* the deputy

*The order is as follows: "As to what is past as to excesses of surveys, the surveyor general shall receive the returns, though they exceed the quantities

surveyors were not to return more than 10 per cent. beyond the usual allowance for roads, on the quantity of lands contained in the warrant or application. But this only held where there was no conflicting right when the survey was made ; for in such case the deputy was not permitted to exceed the quantity called for, with the allowance of 6 per cent. for roads. This was equal justice, and conformable to the settled practice of the lands office. It had been pursued in the Circuit Court at Bedford in November 1801, in Elliot's lessee v. Bonnet, where the jury were strongly disposed to find the surplus of 10 per cent. for the plaintiff. The second rule had been recognized by repeated decisions, and had become the settled law of the country.

The first inquiry with the jury would be, to ascertain whether the warrant of Brown was so described, as that it could be laid on no other place than on the premises in question. If it was vague and loose, then the verdict must be necessarily for the plaintiff; but if it was close and precise, as the court strongly inclined to think, then the last rule would apply, and the plaintiff should be confined to his 130 acres and allowance on his warrant. This rendered it unnecessary to consider the right of deputy surveyors to extend surveys made on the ground before return. The case of Nicholas's lessee v. Holliday, determined here in May 1802, was determined on the ground of the original mistake being made by the agent of Richard Tea, who directed an extension of the lines, and who claimed the additional lands so included.

The judge professed to go no further than was absolutely necessary in the decision of the case before the court; but he could not avoid saying, that this was a strong case in favor of a second purchaser under the warrantee. Viewing the matter in the strongest light against the defendant, here had at least been an attempt to make a survey in May 1765, and lines had been run on the ground. A return of survey operates as notice on a shifted warrant or application. This survey was returned into the surveyor general's office in December 1766; and was known at the time of the plaintiff's survey in December 1774. In the draft thereof it is stated in a N. B., the above "survey takes off part of the tract surveyed for Joseph Brown." Consequently, there was an opposing claim known at the time, which confined mentioned in the warrants or applications, and the 10 per cent. But, for the future, the governor strictly charges his deputies, that they shall not, on any pretence, return more than the quantity, with the allowance for roads, and the 10 per cent., upon pain of being obliged, at their own expense, to rectify any surveys they shall return with such excess or quantity."

the survey to the precise number of acres contained in the warrant.

Verdict for the defendant.

Messrs. Duncan and S. Riddle, *pro quer.*

Messrs. Hamilton and Watts, *pro def.*

JOHN ALDERMAN *against* BENJAMIN WAY.

Actual possession necessary to maintain trespass *quare clausum fregit*. Where a survey has been made on a warrant generally descriptive, and a re-survey is made thereof by order of the Board of Property, whereby part of the old survey is omitted, and new lands added, part whereof has been surveyed under intervening rights, the title cannot prevail as to such omissions or additions injurious to other persons.

TRESPASS *quare clausum fregit*, in cutting down trees. Pleas, *non cul.* and *liberum tenementum*.

The plaintiff claimed under an application of Thomas Morris, dated 22d October 1766, for 300 acres, joining on the west by a survey on a large run,, which leads into the east branch of Little Juniata, about one mile eastward from the path that leads from Little Juniata to Susquehannah, in Cumberland county. It was marked No. 1629.

An original draft of a survey made hereon was shown in evidence, said to contain 350 acres. It was indorsed in the hand-writing of Richard Tea (D. S.) "Thomas Morris 350 acres." On the inside it was marked thus :

" Enoch Davis, No. 1638, 1766.

Thomas Morris, 1629."

Morris on the 20th April 1767, conveyed to David Kennedy in consideration of 5s. On the 4th June 1795, David Kennedy and Michael Cryder appeared amicably before the Board of Property, and stated, that an interference had taken place in their surveys on Warrior Mark Run, and that Kennedy's survey in particular interfered with the lands of the London Company; whereupon it was ordered, that a re-survey should be made by the deputy surveyor, pointing out all interferences, and excluding from Keunedy's draft, that part of the land claimed by the said company. On the 21st May 1796, a re-survey was made by John Canan, (D. S.) excluding the lands previously surveyed for the London Company including acres additional, and omitting acres part of the original survey. Kennedy having sold to Cryder, the interferences between them were not marked. This re-survey, containing 270 acres 61 perches, was returned into the surveyor general's office 31st May 1796. Kennedy conveyed to Cryder, who obtained a patent for the re-survey, and afterwards sold to the plaintiff.

The defendant claimed under a warrant to Walter Hood for 300 acres, on a creek running into the Warrior Mark Run, in

or about one mile from the mouth of the said branch, and two miles from the Warrior Mark, where the branch empties into the said run, specially identifying the lands in question, dated the 18th September 1784. A survey of 292 acres and 144 perches was made hereupon by John Canan, (D. S.) on the 20th May 1785, when the survey of 1766, made for Morris, was not known.

It was questioned, whether the plaintiff's warrant did not describe lands on Half Moon run, and witnesses were called on both sides upon that point ; but it did not appear that the plaintiff had any possession of that part of the tract whereon the supposed trespass was committed.

The court interrupted Mr. C. Smith who had begun to address the jury on the part of the defendant. They said there could be no possible difficulty in the present form of action. Possession was essentially necessary to maintain trespass ; and this not being shown to have been in the plaintiff, he could not recover. At the same time to prevent further litigation, the court would give their sentiments on the title.

Morris's warrant was not shifted from its true place. It is true it was not peculiarly descriptive and special, but it would suit the present tract as well as other lands. Its generality was reduced to a certainty, by the survey said to have been made in 1766. The deputy omitting to return the survey into the office of the surveyor general, did not prejudice the plaintiff's right. That principle only applies where the locality of the warrant or order is changed.

It may be objected, that the survey in 1766, was really made for Enoch Davis, on another warrant. This is mere suspicion. We know nothing of a warrant in the name of Davis. Besides, this may be reasonably accounted for, supposing such a warrant to have existed. The deputy surveyor having made the survey, may have afterwards applied it to the eldest warrant. The survey thus made by the agent of the deputy is discovered to interfere with elder warrants and surveys, and consequently must give way to them. On the 21st May 1796, Canan makes a re-survey by order of the Board of Property, omitting parts of the old survey made for Morris, and adding other lands not included therein. So far as this omission goes, and so far as lands have been comprehended which were before surveyed for Hood, in May 1785, or for any other person under an intervening right, the plaintiff's title must fail. But as to such parts of the land as were comprehended in the old survey, and were not dropped or abandoned by the re-survey, and as to such additions as were not theretofore surveyed under other rights, the title of the plaintiff ought so far to prevail, on every sound and legal principle.

The plaintiff immediately suffered a nonsuit.

Mr. Duncan, *pro quer.*

Executors of JOHN PAWLING *against* Administrators of HENRY PAWLING.

Bond conditioned for the payment of 740*l.* in seven years and the interest thereon yearly and every year ; agreement indorsed thereon by the obligor that if any part of the interest should remain unpaid for the space of three months to allow the obligor lawful interest for the same from the end of the said three months until paid. The agreement may be enforced, and is not usurious.

THE following case was submitted at a Circuit Court held for Franklin county, to the decision of Yeates and Smith, justices, without argument.

Henry Pawling, the defendant's intestate, on the 12th May 1785, executed a bond to the plaintiff's testator in the penalty of 1480*l.* in gold or silver, conditioned for the payment of 640*l.*, on or before the 12th May 1792, and the lawful interest thereon yearly and every year, from the date thereof. He on the same day executed a power of attorney to enter up judgment on the bond.

On the 11th February 1786, the said Henry Pawling, by a sealed memorandum indorsed on the said bond, and by him subscribed in the presence of two witnesses, after reciting the said bond and condition, proceeded in these words : " and whereas from our local circumstances, or from some other cause, the said interest or some part thereof may remain unpaid for a considerable time after due, and the said John Pawling thereby suffer loss, now for preventing thereof, I do hereby covenant and promise to and with the said John, that if any part of the said interest shall remain unpaid for the space of three months, to allow him the said John, lawful interest for the same, from the end of the said three months until paid."

The question submitted to the court is whether the said covenant be prohibited by law, or good and valid ? If the said court shall be of opinion, that the said covenant is prohibited, and not good or valid, then judgment to be entered for the plaintiffs generally ; but if otherwise, then instructions to be given to the clerk of the Circuit Court, to calculate interest according to the said covenant, and enter up the final judgment accordingly.

The justices took time to look into the cases on the subject, and deliberate thereon ; they afterwards certified their respective opinions, which were openly delivered by Smith, J. at a Circuit Court held for Franklin county, before himself and Brackenridge, J. on the 30th September 1805, in manner following :

Yeates, J. In Great Britain, by successive acts of parliament, the rate of interest on the loan of monies and other commodities, was reduced to ten, and from thence to eight, six and five, in the hundred. The stat. of 12 Ann. st. 2. c. 16, provides, that " after the 29th September 1714, no person shall, upon any contract, take directly or indirectly for the loan of any monies, wares, merchandize or

ether commodities whatsoever, above the value of 5%. for the forbearance of 100%. for a year, and so after that rate, for greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts and assurances made after that time, whereby a greater rate of interest shall be reserved or taken, shall be utterly void; and the persons offending therein shall forfeit and lose, for every such offence, the treble value of the monies, wares, merchandises, or other things so lent, bargained, exchanged, or shifted." 4 Ruff. stat. 642.

Our act of assembly of second March 1723, reduced the interest of money from eight to six per cent. per annum; and provides, "that no person shall directly, nor indirectly, for and bonds or contracts thereafter to be made, take for the loan or use of money or any other commodities, above the value of 6%. for the forbearance of 100%. or the value thereof for one year; and so proportionably for a greater or lesser sum; any law, custom, or usage to the contrary notwithstanding, under the penalty of forfeiting, on conviction of the offence, the money and other things lent." 1 Dall. St. Laws 193.

The penalties of usury differ in the two countries clearly: and exclusive of the different rates of interest, it has been doubted, whether under our law, the words not pursuing the British statute, interest may be reserved here, payable at a shorter period, than the term of one year. The question before us is, whether on a bond conditioned for the payment of money in five years, and the interest thereon yearly, a covenant by the obligor to allow the obligee lawful interest on any interest due and remaining unpaid for the space of three months, from the end of the said three months, is good and valid, or whether the same be prohibited by law?

As a case of conscience, it racks the mind with no difficulties or doubts. By the original obligation, the creditor was entitled to the payment of his annual interest by a solemn compact: he had the same right to demand that sum every succeeding year, as he had to demand his principal at the end of five years: the non-payment of it was injurious to him, but advantageous to his debtor. No one therefore can refuse his concurrence in the sentiment of Lord Chancellor Thurlow, that "there is no reason, if a man does not pay interest when he ought why he should not pay interest for that also." 1 Ves. jr. 99. 3 Bro. Cha. Ca. 440. The doubts on the present question arise from our habits in life, and the usual practice of courts of justice. And it must be conceded, that if it has been uniformly fixed as a rule of property, that interest cannot be legally received upon interest, we are bound to acquiesce.

It has been generally laid down as a rule both in a civil law

and in chancery, that interest should not be allowed upon interest. 2 Fonbla. 435.

But the rule admits of exceptions. Amongst other instances, an account settled and allowed by the parties, will carry interest. 2 Ves. 365. 2 Bla. Rep. 761. So the assignees of a mortgage shall have interest on the interest due at the assignment of the mortgage, 2 Cha. Ca. 67, 68. 258. Vern. 169. 2 Vern. 135, provided it be made with the concurrence of the mortgagor, but not otherwise. 3 Atky. 276. 2 Cha. Rep. 78. Nels. 150. Pow. on Mortga. 426-7. And it has also been said by Lord Keeper Finch, 1 Cha. Ca. 258, that a mortgagee whose mortgage was forfeited, should have interest for his interest; but this rule does not appear, Prec. Cha. 116, to have prevailed in any case since, and has been laid aside. Pow. Mortg. 429. 2 Fonblat 436.

In the case of mortgages it is certain, that in general an agreement made at the time of the mortgage, will not be sufficient to make future interest principal, such terms being considered as bearing hard upon the mortgagor, and as oppressive. Pow. Mortg. 441. In Lord Osulston v. Lord Yarmouth, it was laid down by Lord Chancellor Cowper, that no precedent had ever carried the advance of interest so far, that an agreement made at the time of the mortgage, would be sufficient to make future interest principal; to make interest principal, it is requisite, that the interest be first grown due, and then an agreement concerning it may make it principal. 2 Salk. 449. Upon this ground and the principle of acts advantageous to infants being binding on them, was the case of the Earl of Chesterfield v. Lady Cromwell, decided in 1 Eq. Ca. Abr. 287. pl. 1. 9 Mod. 103. In Thornhill v. Evans, 2 Atky. 231, Lord Hardwicke admits, that the mortgagor may upon agreement turn the interest into principal, but subjoins that it must be done fairly, and it is generally upon the advance of fresh money, and even then, it is reckoned a hardship on the mortgagor and an act of oppression. It will not be asserted that this is usually adopted as a rule in England or this country, by monied men.

The rule laid down by Lord Chancellor Parker, in Brown v. Barkham, 1 Wms. 653, seems more conformable to the usual modes of transacting matters of this nature.

“To make interest on a mortgage principal, it is requisite there should be a writing signed by the parties, for as much as the estate in the land is to be charged therewith.” Where a mortgage was given in Ireland, to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments, an agreement that the interest of those sums should rise, on non-payment at the time appointed, or within three weeks after,

from 5 to 8 per cent., was held good, upon appeal to the house of lords. *Burton and Nutley v. Slatterley*. 2 Bro. Parl. Ca. 68.

But whatever may be the law of England, as to interest receivable on mortgages, the doctrine as to interest generally receivable, has been much extended by courts of justice. Lord Mansfield says, upon nice calculations it will be found, that the practice of the bank, in discounting bills, exceeds the rate of 5 per cent; for they take interest upon the whole time the bills run, but pay only part of the money, viz: by deducting the interest first, yet this is not usury. Cowp. 115. The same doctrine is asserted by Blackstone, J. in 2d vol. of his Reports 793.

The reason herefor is given by the Court of Exchequer, in *Caliot v. Walker*, 2 Anstr. 497, that the statute allows interest, not merely of 5 per cent. for a year, but after the rate of 5 per cent. In that case, the court declared themselves strongly of opinion, that a custom in Liverpool for a Banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance carry interest as principal for the next quarter, is not usury.

The case of *Le Grange v. Hamilton*, in 4 Term Rep. 613, is said to be relied on by the plaintiff's counsel. There, a memorandum indorsed on a bond, which was conditioned for the payment of 100l. by quarterly payments of 5l. each, and interest at 5 per cent., "that at the end of each year, the years interest due was to be added to the principal, and then the 20l. to be received in the course of the year was to be deducted, and the balance to remain as principal, and so to continue yearly, until both principal and interest were fully paid," was held not usurious. But it was considered, both in the Kings Bench and Exchequer Chamber, as a question of construction. Lord Kenyon says, it is admitted, that if they intended the computation of interest should be made on the whole sum of 100l. to the end of the year, notwithstanding the several parts of the principal had been paid at the stated periods, it would be usuary. 4 T. R. 614. And all the judges of B. R. went on the ground, that it was not the interest on the 100l. lent, but the interest due that was to be added to the principal at the end of the year; and the interest due could only be taken to mean what was legally due. So also it was held by Lord Chief Justice Eyre, in the Exchequer Chamber. 2 H. Bla. 145.

The authority which has chiefly guided my opinion, is *Morgan v. Mather*, determined by the Lords Commissioners for holding the great seal. 4 Ves. jr. 15. A motion was made to set aside an award. One of the objections made, was, that the arbitrators had allowed the defendant compound interest upon the settlement of an account current

of several years without annual interest. Lord Commissioner Eyre hesitated at first a good deal, upon the point relative to the compound interest. He was satisfied, that it was fair and necessary to have an interest account every year; but whether if there is no express settlement, it ought not to be carried on as interest, instead of being made capital, he had doubts. *Ib.* 16, 17. Afterwards he states, that Lord Thurlow, in Hankey's case, had said, that compound interest was never to be allowed, but on the ground of a contract between the parties to allow it; either an express contract, or to be inferred from the nature of their dealings. He himself had no doubt, there may be a previous contract for compound interest. *Ib.* 20, 21. Ashurst, commissioner, says, compound interest may be allowed where there is a contract for it, or where it is the usage of the trade. And per Wilson, compound interest is not an unlawful thing in itself. Lord Commissioner Eyre desired it to be observed, that the court was not to be understood, to have laid down any thing on this object of interest, that has relation to mortgages.

If this decision is correct, it has proceeded on ground sufficiently broad, to cover the principal case before us. I see no reason why we should not adopt it. The principles on which it is founded, tend to nothing immoral, but conduce to relative justice, and a due adherence to fair contracts. The creditor does not in the language of our law "take for the loan or use of money, directly or indirectly, above the value of 6*l.*, for the forbearance of 100*l.* for one year." Indeed here, he does not take this 6 per cent. per annum; because the yearly interest stipulated to be paid, must be three months in arrear, before interest can be calculated thereon.

Upon the best reflection I have been able to give the case, I am of opinion, that the covenant to allow interest on the interest, is good and valid in law, and should be enforced.

Smith, J. In the case of Crawford and company of Amsterdam v. Willing and Morris, which was tried in the first week of December term 1803, it became my duty to deliver the opinion of the court to the jury, on the subject of interest, the chief justice declining to sit, because of his relationship to one of the defendants, and Yeates, J. being indisposed. I was then led to make some preliminary observations, and to apply them to the case then on trial. Such of them as seem to me to be applicable to the case now under consideration, I beg leave to repeat.

1. On the subject of interest, as well as on many other points, the law has at length, although slowly, melted into common sense. The few exceptions, which yet remain, will gradually wear away.

The pleading a deed, as lost by time and accident, is a strong

instance of the triumph of the sound reason and substantial justice over technical forms, by which justice had been fettered. 8 T. R. 151.

2. For many centuries, those who call themselves learned men, and were so deemed by the rest of mankind, perplexed themselves and others, on this point; strangely mistaking a political rule among the Jews, and adapted to their peculiar system, for a general moral precept, (2 Bla. 455,) although inconsistent with, and destructive of all commercial intercourse. Ord on Usury, 8.

3. It is really a matter of much curiosity, to trace down the progressive opinions upon this point. In making the investigation, we will observe how much the mind is fettered by form; with how much difficulty and struggling, it extricates itself from received opinions and technical rules, however unfounded in reason, however contrary to the great ends of society, in its present commercial and cultivated state.

4. For a long period, all interests on money was held unlawful. 1 Dall. 52. And strange to tell, it has never yet by any act of the British (Ord 31,) or of our own legislature, been declared in express and general terms to be lawful. It was held lawful at first, only tacitly, or by implication, Ord. 31. 2 Dall. 105, per Jefferson; which has hitherto continued to be the mode of regulating it, except in special instances, as on judgments. 1 St. Laws, 13. Nay the 5th section of stat. 21 Jac. 1, c. 17, declares, that that law shall not be construed to allow the practice of usury, in point of religion or conscience. 5 Bac. 410. Add, for the satisfaction of the bishops. Ord. 5.

5. The allowance of interest has been introduced with technical reluctance, or by slow degrees in many cases, in which common sense and commercial justice declared it equally due, as in other cases where it had been previously allowed. For instance, it was ruled, that no interest could be allowed for money lent, unless there be a note for it, 2 Stra. 910, and many other instances enumerated in 1 Dall. 105, per Jefferson. But see now 3 Wils. 206. 2 Bla. Rep. 761. Interest is due on all liquidated sums, from the instant the principal becomes due and payable. 2 Burr. 1081. For money lent. 1 H. Bla. 305. 1 Dall. 349. Per Shippen, president. It is the constant practice in Guildhall, either by the contract, or in damages, to give interest for every debt detained. 1 Ves. jr. 63. Per Lord Thurlow. I cannot distinguish the case of interest due by contract, where there is no note, from the case where there is a note. 1 Ves. jr. 302. Per Lord Loughborough.

6. Formerly, interest was only calculated to the time of bringing

the action ; no interest could be recovered during its continuance till lately. 1 Bl. 263. 2 Burr. 1085. Bull. 275.

In England, to this day, interests, subsequent to the judgment, cannot be recovered on it. 2 Ves. jr. 162. A fresh action must be brought for the subsequent interest. *Ib.* The law would no doubt have been holden the same in Pennsylvania, had not an act of assembly removed the palpable injustice. 1 St. Laws 13.

7. It was formerly laid down in general terms, that no interest could be allowed on the balance of an account for goods sold and delivered ; nor in any case except on promissory notes and bills of exchange. Barnes 228. 1 Dall. 265. It was afterwards ruled, that though by the common law, book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade, or a special agreement, or in case of long delay, under vexatious or oppressive circumstances. Dougl. 361, per Ld. Mansfield. 1 Dall. 3, 5, per M'Kean. Also when it is the established and known course of the trade. 2 Dall. 193, per *tot cur.*

8. It is now the law, founded on reason and justice, and conducive to fair dealing and punctual payment, that where money is made payable by an agreement between the parties, and a time given for the payment of it, this is a contract to pay interest from the day in case of failure of payment at the day. 2 Burr. 1088. 3 Wils. 127.

In the case of bankruptcy indeed, where there is sufficient to pay debt and interest, interest on bonds is not to be carried beyond the penalty ; although upon other contracts and notes bearing interest, the interest is to be computed at the rate specified, to the full amount due. 1 Atky. 80. 3 Bro. Ch. Ca. 438. That exception stands only on authority. 3 Bro. Ch. Ca. 44.

These are all the observations made and authorities cited in that charge, which are applicable to the case stated for our opinion.

The honesty and honour of the contract as stated, on the part of the obligor, the indulgence and fairness on the part of the obligee, must strike and force conviction on the understanding of every man who reads it.

Is there any rule of law which forbids the performance of it ?

If there is, we must be bound by it ; but it must be very clear and very strong, thus to entangle the plain justice of the case.

All laws stand on the best and broadest basis, which go to enforce moral and social duties. 3 Term Rep. 63, per Ld. Kenyon. I have so great a veneration for the law, as to suppose, that nothing can be law, which is not founded in common sense and common honesty. *Ib.* 62, per Eundem. 4 Term Rep. 512. Courts ought not unless they are

absolutely obliged to it, to construe even an act of the legislature, contrary to the plain and clear principles of justice. 5 Burr. 2739, Per Ld. Mansfield.

No cases have been cited by the counsel on either side. I will briefly state, and observe on such authorities as I presume are relied upon, in favor of the defendants, and then those in support of the plaintiffs, claim.

Proviso in a mortgage, that if interest be behind for six months, then that interest should be made principal and carry interest. Per Cowper, chancellor, no precedent has ever carried the advance of interest so far, that an agreement made at the time of the mortgage will be sufficient to make interest principal; but to make interest principal it is requisite that interest be first due, and then an agreement concerning it may make it principal. 2 Salk. 449.

This is the case of a mortgage; and even in 2 Ves. Jr. 20, where compound interest had been allowed, Eyre, Ch. Justice, said, the court was not to be understood to have laid down any thing upon the subject that had relation to mortgages. Neither need we now. The exception as to mortgages stands only on authority. 3 Bro. Cha. Ca. 440.

The case of Sir Thomas Meers, heard before Lord Harcourt, is an authority in point, that chancery will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. Meers in some mortgages had inserted a covenant, that if interest was not paid at the day, it should be turned into principal, and was relieved against it. Talb. 40. There is an implication here, that a covenant to turn interest into principal is not illegal. S. C. cited 16 Atky. 304.

A mortgage made at 5 per cent., but if interest be not paid within two months after due, then to pay 5l. 10s. per cent; this is in nature of a penalty, and chancery will relieve against it; otherwise if 5l. 10s. be reserved originally, and to be lessened to 5l. per cent. if duly paid within two months after due. 2 Vern. 316, in 1694. *Quære tamen*, says the reporter, who was the most eminent chancery lawyer of his day, for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in expressing one and the same thing. Ib. 317. It is said in 1 Wms. 653, that the court will relieve, if only a very short time has happened. In 2 Vern. 134, there is a contrary decision, and the following case is also contrary.

Mortgagee lends money at 6 per cent., and in the deed agrees to take 5 per cent., if paid within three months after due. If mortgagor fail pay at the precise time, he must afterwards pay 6 per cent; for

by the lord keeper, if it were so, that he must take 5 per cent. yet at least he ought to have interest upon interest, from the time it ought to have been paid. Prec. Cha. 160. See 1 Wms. 653. In this case, the lawfulness of interest upon interest in consequence of a previous agreement, is recognized.

To make interest principal on a mortgage, it is requisite there should be some writing signed by the parties, forasmuch as the land is to be charged therewith. Per. Parker C. 1 Wms. 653.

Here the mortgage was at 6 per cent. but mortgagee to accept 5 if paid within 8 months after due; there being great arrears, mortgagee sent his account computing interest at 6 per cent. and claimed interest upon the amount: the court held the one per cent. a satisfaction. Prec. Cha. 161. But he must pay the 6 per cent. S. C. cited 2 Bac. Supp. 240.

The court will order satisfaction to be entered on the record, in an action on a bond of indemnity, on the payment of the penalty and costs. 6 Term. Rep. 808. I admit this case to be law, where the bond is for the performance of a collateral condition, in which interest is not the measure of damages; and as against a surety, who otherwise on entering into such bond, in the penalty of 100l. might be liable to pay 10,000l. 2 Bl. Rep. 1190. But where interest is the measure of damages, which the plaintiff can recover, I see no reason why he should not at law recover the whole interest, although it should exceed the penalty in damages.

That plaintiff may, in debt on a bond, recover to this extent, is warranted by the following authorities. Show. P. C. 15. Bunb. 23. 2 T. R. 388. A case before Lord Mansfield, 6 Geo. 3. cited by Buller Ib. 389, Bull. Ni. Pri. 62, and in Webster's ex'rs. v. Wallis, upon argument judgment was given in the Supreme Court for the penalty of a bond with a collateral condition, with interest from the time the contract ought to have been performed. 2 Dall 252. See the cases therein cited; though in equity the plaintiff cannot recover beyond the penalty, unless the defendant comes to ask a favor. Ib.

A covenant to pay interest upon interest is unlawful; for simple interest is a reasonable compensation, admitted arguendo. Comy. Rep. 351. 1 Stra. 171. 174. If simple interest paid yearly, be but a reasonable compensation for the delay of payment of it for a great number of years is not a reasonable compensation; because by such delay for less than twenty-six years, the obligee loses a sum equal to his whole principal.

These are the principal authorities, that apply in behalf of the defendants, which occur to me at present. And were there no

authorities on the other side, I question whether we would feel ourselves obliged to decide, contrary to the plain meaning and stipulation of the parties to the engagement entered into for the accommodation of Henry Pawling.

I will now state such authorities as warrant me in giving an opinion to carry into effect the engagement in the case stated.

Lord Thurlow has said, " I am in favor of interest upon interest, because I do not see any reason, why, if a man does not pay interest when he ought, he should not pay interest upon that also ; but I have found the court in the constant habit of thinking the contrary." 1 Ves. jr. 99, 133. He has further said, that compound interest is never to be allowed but on the ground of a contract between the parties to allow it, or to be inferred from the nature of their dealing, as if it were the course of the trade in which they were engaged, and thence to be inferred that it was their intention to allow it. It must be made out to be so, either from a specific contract, or inferred from the usage of the trade, &c. " I have no doubt there may be a previous contract for compound interest." Per Lord Commissioner Eyre in 1792. 1 Ves. jr. 20, 21. Ord 36. Compound interest may be allowed where there is an express contract for it, or where it is the usage of the trade. Per Com. Ashurst. *Ib.* 21. It is not an unlawful thing in itself. Per Com. Wilson. *Ib.*

This is a decision in point, given after doubts had been entertained (not as to the principle, but whether there was any proof of such contract) by the lords commissioners, who were all sound lawyers, and after consideration. Lord Commissioner Eyre, afterwards lord chief justice of the Common Pleas, was equal in point of sound and dispassionate judgment and integrity, to any judge who ever sat in that court.

Ord was therefore warranted in laying it down, that it is not illegal to stipulate for compound interest, or that interest as it becomes due shall be converted into principal, and carry interest. Ord on Usury 36. He cites 2 H. Bla. 144. 4 T. R. 613. 2 Anstruth. 495.

Receiving interest in advance is no usury. 2 Bla. Rep. 798. Striking the balance quarterly, amounts to a fresh agreement at the beginning of each quarter, to lend the sum then due. And many other cases may be cited, to show the gradual approaches of the law to the standards of commutative justice.

If there be a covenant for payment of an additional 1 per cent. chancery will not relieve ; thus, where money was lent on mortgage at 5 per cent., and the mortgagor covenanted to pay 6 per cent., if he made default in payment of interest for 60 days after the time of payment, the court ordered, that from default made, the mortgagor should pay 6 per

cent. for, that this covenant was the agreement of the parties, and not to be relieved against as a penalty. 2 Vern. 134. 2 Bac. Sup. 239. Vid. ib. *Buston v. Slatterley*. S. C. 3 Bro. P. C. 68.

Upon the whole ; as this is not the case of a mortgage, even supposing the law of Pennsylvania relative to mortgages were similar to the law of England, which cannot be admitted ; as we find, that in many instances, interest is now allowed, where it was formerly held that it could not be recovered, as there is no rule of law, equity or justice, against the recovery according to the contract in this instance ; as the contract is not for more than 6 per cent. per annum, interest to be paid after that interest becomes due ; as there is not only nothing immoral in the contract, but as it was made with the purest good faith on both sides, and for the accommodation of Henry Pawling, without stipulating for a cent more than the law allows ; I feel myself not only warranted, but compelled by the pure principles of law, rightly understood, and applied to the beneficial intercourse of mankind, to declare that the said covenant is not prohibited by law, but is good and valid.

PHILIP BENNER *against* WILLIAM W. COTGREAVE.

Domestic attachment issued against an absconding debtor under the act of 2d March 1723. On the application of the defendant afterwards to enter special bail, the court will not dissolve the attachment provided it issued on due grounds ; though they will in a clear case, protect the debtor from the malevolence or mistake of his creditors.

THIS was a writ of domestic attachment in case, issued in the Court of Common Pleas of Allegheny county, on the 11th May 1804, on filing of the affidavit required by law, returnable to the following June term. The sheriff returned, that he had attached sundry merchandize and the books of accounts of the defendant, and the court appointed auditors under the act of assembly.

At an adjourned court held on the 4th August 1804, the defendant appeared in his proper person, and moved the court by his-counsel for leave to enter special bail, and that thereupon the attachment should be dissolved. The court on argument, overruled the motion, as not admissible in law : and the cause was then removed under a special allocatur, to September term 1804.

At a Circuit Court held at Pittsburg, November 3d, 1804, before Yeates and Smith, justices, Messrs. Addison and Ross renewed the motion, for leave to enter special bail, which had been made in the Common Pleas. It was admitted, that since the attachment was taken out, a *capias* in case had issued on the 23d August 1804, at the suit of John Tomlinson against the defendant, wherein bail had been marked in \$265 and 46 cents, and a *capias* in debt in 174l. 2s. on the 4th

October following, at the suit of William Richard Seabrook against the defendant, on both which writs he had been arrested, and had given special bail. It was further admitted, that the defendant when the attachment issued, was an absconding debtor, within the meaning of the act of assembly of 2d March 1723. 1 Dall. St. Laws 195. § 1.

But it was contended, that all the acts of assembly relative to attachment, were intended merely to enforce an appearance, and the entry of special bail.

They are all predicated on facts existing as against absent persons.

Here some of the creditors arrest the person of the defendant; while the present plaintiff for the supposed use of all his creditors, locks up all his property real and personal, and claims the disposition of it; although ultimately that disposition will not and cannot operate as a discharge of his person from his imprisonment, or as a complete exemption of future property from the debts now contracted.

The court cannot interpose, and prevent a creditor's remedy by arrest for his debts. It would contradict every principle of common sense and common justice. At the same time it cannot be denied, that to take from a man every species of his property, rights as well as credits, to secure the interests of the general mass of his creditors, and at the same time, to permit some of his creditors to carry on suits against him, must be radically wrong.

The court to prevent injustice, must have a superintending power over their process. The act is silent in what instances they shall use their discretion as to dissolving attachment, but their authority in this particular is implied in the nature of the case. An upright and able trader is frequently obliged to go abroad, on his mercantile affairs: if an unprincipled creditor, perhaps of indigent circumstances, should be so hardy as to take the oath required by the act, or even an honest creditor should do it through mistake, the court on application of the party injured, would supersede the process, if he came before the court in due and convenient time. The rights of the creditors in general, do not attach immediately on service of the attachment, or the return thereof, or the appointment of auditors. 1 Atky. 67, 104, 152. In cases of bankruptcy, which is an action and execution in the first instance, the petitioning creditor gives bond to prove the facts stated in his petition upon oath: but this is not necessary under the attachment law, and therefore the cases are dissimilar.

Here the end of the attachment is answered. The debtor appears, and offers special bail: he is entitled to a trial by jury, on the present de-

mand made against him ; and unless there are strong and imperious terms in the law, restrictive of the powers of the court, the judges will allow him this right.

Mr. Collins for the plaintiff answered, that it has been admitted already, that the defendant here was at the time of issuing the attachment, within the true meaning of the law of 2d March 1723.

If that fact had been denied, we were ready to establish it by due proof, and that the defendant has attempted to swindle his creditors out of \$24,000.

The question therefore is not as to the court's power of interfering and setting aside attachments improvidently or unfairly issued, but whether such circumstances exist in the present instance, as will justify their interposition.

The process of foreign attachment was introduced to compel the appearance of distant creditors ; but domestic attachments operate on persons, who have been inhabitants of the state, and have absconded from their usual abode for six days, with design to defraud their creditors. They are therefore founded on a supposed fraud established upon oath, which puts the party out of the general system of a common debtor, and are analogous to the commissions of bankruptcy, though they do not correspond therewith in all their parts.

By the 4th section of the act, no second or other attachment can issue, unless the first attachment be not executed, or happens to be dissolved by the court. The inference is irresistible, that all the creditors have an interest in a domestic attachment which has been duly executed, provided it has issued on good grounds.

The commission of bankrupt is expressed to be in behalf of the petitioner, and all other creditors: A petitioner is no more concerned, than any others that shall come in. 2 Cha. Ca. 192, 193. The commissioners have power to examine the bankrupt upon interrogatories, &c. The assignees may sell lands and goods, and sue for debts. The overplus of the bankrupt's estate is to be returned. In all these particulars, the auditors appointed have the same powers under the 6th, 7th and 10th section of our law.

Unless the bankrupt has satisfied all his creditors, (1 Atky. 146,) or there has been some error in issuing the commission, or misbehaviour in the commissioners, the chancellor will not supersede the commission. Sel. Cha. Ca. 46. 2 Wils. 545. The usual course is, for the lord chancellor to order the bankruptcy to be tried on a feigned issue at law. 1 Atky. 128, 218. If indeed it appear plainly, to have been taken out fraudulently and vexatiously, he will at once supersede the

comission, and order the petitioner's bond to be assigned. 1 Atky. 144. But those facts do not come in question here; the auditors are under the control of the court.

It is presumed, no ground has been laid before the court to dissolve this attachment. All the creditors are interested, and their proportions are to be adjusted. They have nothing from whence they may expect any compensation, but the small remnant of the defendant's property, which has been attached. If he is restored thereto, they are without remedy, and the compliment paid to him must necessarily be at their expense.

The hardship complained of, is, that two of his creditors have arrested him, while this process of attachment is going on for the joint benefit of all. It may justly be doubted, whether those creditors who have brought actions, knowing of the pendency of the attachment, are not precluded from coming in under it, as in cases of bankruptcy.

Although a bankrupt is privileged from arrest during the time allowed by the commissioners for his examination, yet the protection does not extend beyond the enlarged time. 1 Atky. 148. An execution taken out after the creditors had signed, but before the lord chancellor had allowed the certificate, has been held good. 1 Term Rep. 361.

[NOTE. It was resolved in Supreme Court, *Pesoa v. Passmore*, in December term 1804, that a *ca. sa.* may be served on a bankrupt after the commissioners have signed his certificate of discharge, and before it is allowed by the district judge, under the act of congress of 4th April 1800.]

The hardship therefore is not peculiar to the defendant, who absconded with design to defraud his creditors.

But if the holding the defendant to bail on the two writs of *capias* is oppressive, why has there been no application to the court below, to discharge him on common bail?

And upon the whole, it is hoped that the court will not dissolve this attachment.

The court continued the matter under advisement, in order to enquire whether any practice had prevailed under the attachment law upon this point, and promised to certify their opinion, which was agreed to be entered.

To their great surprise, they could find no instance of such a motion.

They afterwards certified to the clerk of the Circuit Court, that though in a plain and clear case, they would have no difficulty in protecting a debtor from the malevolence or mistake of his creditors, who had issued a domestic attachment against him, provided he applied

in due and convenient time, yet under the circumstances of the present case, they found themselves constrained to overrule the motion, made on the part of the defendant.

SEPTEMBER TERM, 1805.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

GEORGE MOORE, jun. *against* ABRAHAM WITMER, sen.

An appeal from the Circuit Court will be received, tho' the record be not filed until the first day of the term, after the court have risen, if reasonable efforts have been made to file it in due time.

Mr. M'Kean in the afternoon of the first day of the term, moved, that the appeal in this cause from the decision of the last Circuit Court for Lancaster county, in April last, wherein the motion for a new trial made on the part of the plaintiff, was overruled, should be received. It was grounded on his own affidavit, that on the Saturday preceding, he had received the record of all the proceedings by the mail from Lancaster, and had immediately sent the same to the office of the prothonotary of this court, in order to be filed as the law directs, but no person was found therein, the office being locked, and the Court of Nisi Prius then adjourned.

Mr Ingersoll for the defendant, objected to the receipt of the appeal. The circuit law of 20th March 1799, 4 St. Laws, 364, § 4, directs that "the record shall be filed with the prothonotary of the Supreme Court before the next term; and in failure thereof, judgment shall be confirmed, and execution awarded in the same manner, as if such appeal had not been made." The words of the act are imperative on the court, and leave them no latitude of construction. Before the term, cannot possibly mean, after the term has commenced. The legislature meant to guard against delay. The whole term is in law but one day. But even admitting that the proceedings might be filed in the office on the first day of the term, before the court opened, why was it not done in this instance? Here has been gross laches, in delaying the transmission of the record from the month of April last.

Mr. M'Kean, *é contra*. The plaintiff has been guilty of no neglect. His intentions of appealing were made known at the

circuit, and the certificate of his counsel was then subscribed. He early applied for the copy of the proceedings, but he could not immediately obtain it, from the press of business. The record came down in due time before the term. It was not his fault that he could not file it; he made use of due efforts for that purpose. A writ returnable to a term, may be served, on the whole of the first day of the court. A mortgage brought into the recorder's office, is considered as recorded on the day it is lodged there. But the court have adopted a practical construction of the law. In *Ebenezer Griffith, esq. v. Alexander Ogle and Peter Kimmel*, an appeal from Somerset county, was filed on the 6th December 1802, after the court met, on the first day of the term, on full argument.

Smith, J. That cause was tried before me in the Circuit Court. The appeal was received on the ground of consent, between the counsel at Somerset.

Per cur. The circumstances disclosed to us in the principal case, amount to an equitable compliance with the injunctions of the Circuit Court law. It would be unreasonable to reject the appeal, because none of the clerks were in the prothonotary's office on Saturday afternoon, to receive the record.

Appeal received.

JOHN EDWARDS *against* THOMAS EWING, executor of JAMES
BARR.

In suit brought against executors or administrators, an affidavit of defence is not necessary, by the practice of the court.

On process returnable to this term, Mr. Ingersoll for the defendant, moved the court for their opinion, whether by the practice of the court the defendant was bound to file an affidavit of defence. It is admitted on all hands that such affidavit is not necessary in the cases of executors or administrators generally, because they cannot be supposed conversant of the facts out of which the defence arises. The court can only judge from the record.

Mr. Rawle for the plaintiff. The present suit is brought against the defendant as executor *de son tort*; and there is a plain distinction between a rightful and wrongful executor. The latter cannot retain for his own debt in equal degree; his plea is, that he is not executor. Though he may not know whether the debt is just or not, yet he must know whether he has intermeddled with the effects of the deceased, or

not. The declaration and plea will be filed in due time, and the defendant may then apply to the court for their opinion.

Mr. Ingersoll replied, that under the circumstances which attend this case, the defendant could not swear absolutely that the goods he had intermeddled with, were his own property, though he certainly believed so. His own effects and those of the deceased, have become intermingled in a course of trade.

By the court. The case comes before us prematurely. At present we are confined to the record, and cannot know that the defendant is sued as executor in his own wrong; and of course the general rule must prevail, which does not oblige executors or administrators to swear to defences, in suits brought against them in their representative capacity.

WILLIAM RICHARDSON ATLEE *against* MARY SHAW and THOMAS SHAW,
executors of SAMUEL SHAW.

The court may award a *tales de circumstantibus* on a defect of special jurors under the act of 29 March 1805.

A SPECIAL jury had been struck for the trial of this cause. Upon the panel called, a sufficient number of jurors did not appear, and the plaintiff's counsel applied for a *tales de circumstantibus*. Mr. Ingersoll for the defendants submitted to the court whether this could be done in the case of a struck jury, under the late act passed 29th March 1805. It had been much doubted at the bar, the provision for the awarding a tale from the by-standers, in the 10th section, having no reference to the section immediately following, wherein the proceedings in case of struck juries were ascertained. It now became necessary to fix the practice of the court in such cases.

By the court. We do not find any provision in the British statute 3 Geo. 2, c. 25. (vide sect. 15. 6 Ruff. stat. 28.) authorizing the award of tales men, and yet a tales may be awarded by the courts at Westminster, even in the case of a special jury. 2 Wils. 366. 5 Term Rep. 453. Under our old act of 19th March 1785, 3 Dall. St. Laws 265, the 12th section provides for the return of by-standers without reference to the 17th section which directs how special juries shall be struck, and yet the uniform practice of the court has been in such instances to direct tales on the defect of the special juries, at the prayer of either party. The same principal would govern for the sake of

justice, under the jury act of 26th March 1805, 7 St. Laws 183 ; but the words are much stronger therein as to this point, as it relates to the city and county of Philadelphia. The 2d section directs, that an additional wheel to be numbered No. 3, shall be provided for that city and county, for which a sufficient number of names shall be selected and deposited therein for special jurors, &c. The 10th section directs, that if a sufficient number of persons so summoned and returned as aforesaid, shall not appear, &c., the court shall order the jury to be filled up from qualified bye-standers ; so that this section clearly refers to struck jurors, as well as to the general panel. The court therefore feel themselves bound to grant the motion.

The sheriff accordingly returned the tales men, and the plaintiff obtained a verdict, without opposition.

Messrs. T. Ross and Morgan, *pro quer.*

ISABELLA SHEED *against* GEORGE WARTMAN.

Qn. Whether a justice of the peace can proceed to judgment and execution in case of rent exceeding 20l. and not exceeding 17l. 10s. under the act of 28 March 1804.

A *habeas corpus ad subjiciendum* under the act of 1785, issued to James Rolph, the keeper of the debtor's apartment, to bring up the body of the defendant before the court. He returned, that he detained him in custody, by virtue of an execution issued by Joseph Cowperthwaite, esq., a justice of the peace, for a debt of 29l. 10s., interest thereon 3l. 3s., and 15s. 6d., costs. The nature of the debt was not specified in the execution, but it appeared by a transcript from the justice's docket, that on the 8th September 1804, a summons issued against the defendant to appear on the 14th, on which day judgment was entered against him for 29l. 10s. for rent ; that on the 1st October an execution issued against him ; on the 16th May 1805, an *alias* issued, and on the 2d August following, a *pluries* issued, on which the defendant was taken in custody.

Mr. Meredith for the defendant excepted against the jurisdiction of justices of the peace, in cases of rent exceeding 53½ dollars. In common language debt and rent are different things. By the 2d section of the act of 1st March 1799, the powers of the justices were expressly extended " to all cases of rent, not exceeding the sum of 53½ dollars ; and the justice before whom any suit was commenced for the recovery of rent, had thereby an authority to admit a defalcation or set off of the just account of the tenant out of the same, and the landlord might prosecute the said suit to judgment and execution, as in other cases, or if he think proper might waive further proceedings be-

fore the said justice, and distrain in the usual manner for the balance so settled, &c," (4 St. Laws 352.) This law by § 8, was declared to be in force for two years, and until the end of the next session of general assembly. A bill to revive this act and make it perpetual, was disapproved of by the governor, but it was passed by two thirds of the house of representatives on the 22d December 1803, and of the senate, on the 2d January 1804. (6 St. Laws 3, 4.)

The one hundred dollars act (6 St. Laws 383) does not repeal the law of 1st March 1799, as will be seen by reference to § 20, which specifies the laws thereby repealed.

The words of the 1st section though general do not include rents *ex nomine*; demands for damages on assumptions, accounts, and promises; demands of debts, bonds penal and single bills, refer to matters of a personal and not of a real nature: they are explained by the subsequent clauses.

The difficulty of the principal case arises out of § 12, which it must be confessed is very obscurely worded, if it was intended to confer a summary jurisdiction in the case of rents to the amount of \$100.

It is expressed "that the powers of the said justices of the peace, shall extend to all cases of rent, not exceeding \$100, so far as to compel the landlord to defalcate or set off the just account of the tenant out of the same; but the landlord may waive further proceedings before the justice, and pursue the method of distress in the usual manner for the balance so settled. No appeal shall lie in the case of rent; but the remedy by replevin shall remain as heretofore."

It would seem, that the intention of the legislature was to confine the settlement of the rent due to the landlord, after deducting the set offs of the tenant, to the jurisdiction of the justice; but that he shall proceed no further. Else why are the words so far introduced? Why is the penalty inflicted for the landlord's distraining and selling more, than to the amount of such balance? Why is there to be no appeal in the case of rent, contradistinguished from other cases? Why is the sole remedy to be by replevin?

The difference of expression between the laws of 1st March 1799, and 28th March 1804, cannot otherwise be reasonably accounted for. The former came into new life by the act of the senate on the 2d January 1804, and the latter became a law within three months afterwards. When it was meant by the former law to extend the jurisdiction of justices of the peace to 20l. the power is conferred by express words; they are enabled to settle the balance by admitting of set offs; and

landlord may proceed to judgment and execution before them, or use the alternative of distress. The power of appealing is reserved to the parties by the 8d §, in all cases where by that act the powers of the justices were extended. Such provisions do not occur in the last act: the justice's powers go to a certain length, in cases of rent, and there stop: no appeal is given: it seems morally impossible to reconcile the two laws, unless our construction is adopted.

Mr. M'Kean for the plaintiff admitted that the law under consideration was worded inartificially, but insisted, that the intention of the legislature might be extracted therefrom. Subsequent laws varying the provisions of former acts, thereby abrogate them without any express words of repeal. The meaning of a law is to be taken from every clause and word in it; and the technical meaning of expressions applied to a science, must be supposed to have been contemplated by the legislature, not the sense in which they are used in vulgar language.

The law in question is entitled, "an act for the recovery of debts and demands not exceeding 100 dollars, before a justice of the peace."

The 1st section "extends the power of the justices of the peace to all cases of demands for damages on assumptions; also notes, book debts, accounts, and promises, of whatever kind, except, as is therein after excepted, and to demands of debts, bonds, penal and single bills, not exceeding the amount of 100 dollars." Now it is perfectly clear that a demand for rent is a debt, and whether it is founded on a verbal or written engagement, it falls under the denomination of a promise. Unless therefore such demand is enumerated in the exceptions to the jurisdiction of the justice by the legislature, it is comprehended under the general words. Those exceptions are specified in the 15th §, and consist of ejectments, replevins, actions on real contract for the sale or conveyance of lands and tenements, and actions upon promise of marriage. Contracts for rent are not excepted. An action of debt will unquestionably lie for a sum certain. By the 14th section it is provided, that if any persons sue for any debt or demand, made cognizable by the act in any other manner than is directed thereby they shall not recover costs in such suit.

By the 12th section it is declared, that "the powers of justices of the peace shall extend to all cases of rent not exceeding 100 dollars."

But it has been objected, that the generality of these words has been restrained by the subsequent phrases, so far as to compel the landlord to set off the tenant's account; and that the justice's power is confined to the settlement of the true balance between him and his tenant. It seems passing strange, that the justice should be called

on judicially to decide as to the sum due for rent, and all matters of dispute relative thereto, and yet should not be impowered to enter judgment and issue executed thereon. This would not be favourable to the interests of landlords. "But the landlord may waive further proceedings before the justice, and pursue the method of distress." These are the words of the law. They give the landlord an election. He may either waive or not waive further proceedings before the justice. If he does waive, he may pursue his remedy by distraining his tenant's goods. If he does not waive the consequence necessarily must be, the justice's proceeding to judgment and execution, though the act does not contain the same pointed provisions in this particular as the law of 1st March 1799. A twofold effect is produced by the expressions under consideration, varying the common law. First, the suit before the justice shall not determine his election of proceeding *pro hac vice* by distress also; and secondly, the tenant may set off his just account. By the British decisions, there can be no set off to an avowry justifying under a distress for rent, because the distress is not an action, but a remedy without suit. Bull. 181, 4to. ed. 177. It is submitted to the court, whether the justice had not jurisdiction in this case.

The court were divided in their opinions. The chief justice and Yeates held, that the justice had jurisdiction; Smith and Brackenridge held that he had no jurisdiction; but they also declared, that as it did not appear by the execution that the same had issued for rent the party was not relievable by this writ of *habeas corpus*, but that his proper remedy was by *certiorari*.

The prisoner was remanded.

PHILIP COPELAND *against* JOHN BURG and JAMES ROSS.

Record on appeal from the Circuit Court filed in the afternoon of the first day of the term. Appeal dismissed.

MR. WILSON for the defendants, moved to dismiss an appeal from the last Circuit Court of Lancaster county, the record of the proceedings having been filed in the afternoon of the first day of the term, after the court had risen.

The facts being established, the appeal was dismissed.

WILLIAM NAILOR *against* WILLIAM FRENCH.

Where one has lived and traded here for some years, and then sails as a supercargo to the West Indies, carrying with him four-fifths of his property and making a partial assignment of one-fifth for the benefit of his creditors here, and there engages in new business, and is wholly silent in his letters about h's return for nine months, his property is subject to foreign attachment, though he expressed an intention when he sailed, of returning in twelve or eighteen months at furthest.

RULE to show cause, why the foreign attachment issued in this cause on a promissory note, should not be dissolved. The writ had been sued out on the 17th December 1804, returnable on the second return day of the last December term.

It appeared in evidence, that the defendant has served his apprenticeship with William Sitgreaves, in Philadelphia, twelve years ago, and after its expiration was sometime his partner, and then traded for himself. He had a wife and children in the city, but from some family disagreement, lived separate from them for five or six years. He sailed as supercargo in the brig Hiram to the West Indies, having property on board to the amount of \$30,000. Immediately previous thereto, on the 1st December 1804, he executed an assignment of all his property (excepting what he had on board the brig) amounting to between \$7000 and \$8000, to William Fleming, in trust, for the use of his creditors in Philadelphia. He then declared his intentions of returning to the city in 12 or 18 months at furthest. Two other attachments were laid on the defendant's effects, in which like rules to show cause were obtained. Of these attachments the defendant was duly apprised by letters from his assignee; but though he acknowledged the receipt of the letters, he said nothing of his return in his answers. Two other letters from him, dated in February last, were also shown by the plaintiff's counsel, wherein there was a perfect silence as to his return. A gentleman saw the defendant at Cape Francois, and also at Gonaves, in February 1805, and understood from him, that he did not intend to return soon to the continent; and the common report in both places was, that he had undertaken new commissions, and meant to establish himself in business in the West Indies.

Mr. T. Ross in support of the rule, contended, that French must be considered an inhabitant of the state, within the true meaning of the attachment laws. He had been actually resident here many years, had a wife and children, and had gone on occasional business to the West Indies in prosecution of his mercantile character. He not only avows no intention of changing his domicil, but expresses his design of returning within a limited period. His engaging in new business was not incompatible with his *animus revertendi*, and he might well persevere in his intentions without making them the subject of his correspondence. He might trust to the justice of his country, that

his effects would not be permitted to be attached illegally. The creditors took out their attachments within seventeen days after he had sailed, and those writs must either be good or bad when they issued. At this period it could not be pronounced that he had no intention of returning when the object of the voyage was completed.

Messrs. Gibson and Meredith *è contra*. This is a contest between creditors and a debtor. The assignment will have its legal effect. There is no controversy between the different plaintiffs and the assignee.

The object of the legislature in passing the act of 4 Anne c. 28, was to subject the effects absent debtors to the payment of their debts; as it appears by the preamble, that they were not before that time equally liable with the effects of those persons who resided on the spot. *Lazarus Barnet's case*, 1 Dall. 152. *Taylor and Finlayson v. Knox et al.*, *Ib.* 158. *Lyle v. Foreman*, *Ib.* 480. The defendant carried with him to St. Domingo the bulk of his property, having made a partial and inadequate assignment for his Philadelphia creditors. He left no funds here to discharge his other debts. What other steps could his creditors take for the recovery of their just demands? Process of summons would not lie against him, as he was no freeholder, and had no place of abode within the state. He could not be arrested, because his body could not be found. To found a domestic attachment, it is indispensably necessary that oath should be made that he had absconded with intention to defraud his creditors. Would it be consistent with the policy of the laws or any sound principle, that under these circumstances the creditors should be without remedy?

He cannot be deemed an inhabitant, in any sense of the word. He has transplanted himself to a foreign country, with four-fifths of his property, there to seek his fortunes! He has undertaken new business, and declared he does not mean soon to return! Though the intercourse between this port and St. Domingo, is so frequent, not one solitary letter is produced from French, announcing his intentions of returning to this city.

By the court. The only question is, whether William French, the defendant, is an inhabitant of the state, in contemplation of law, within the true spirit of the attachment acts?

Whether he can be considered such, or not, must be evinced by his individual acts, which certainly countervail any loose expressions. He has sailed to St. Domingo, and carried with him four-fifths of his property. He has engaged in trade in the West Indies, and for nine months and upwards, has been wholly silent about his return. His leaving a wife and children in the city is of no weight in this case, since he has been separated from them

for five or six years. It cannot fix his domicil. Though we do not profess to fix any general rules, as to what will constitute an inhabitancy within the meaning of our attachment laws, we have no hesitation in saying, that the circumstances in this case abundantly show, that the defendant cannot be deemed an inhabitant of the state, and therefore the rule must be discharged.

JOSHUA B. BOND *against* JAMES OLDEN.

To impeach an award for mistake, the party must make out a clear case. The court will not examine the referees as to the minutiae of a disputed account.

EXCEPTIONS to the award of referees, who found the sum of \$7962 36, due to the plaintiff.

The defendant's counsel relied on three grounds. 1. The referees have committed mistakes in their construction of certain articles of agreement made between the parties. 2. They have erred in principle, in not charging the plaintiff with \$6735 81, respecting a bond due from Thomas Fitzsimons and Robert Morris, which was assigned by the plaintiff to the defendant. 3. They have refused to charge the plaintiff with \$9000 and upwards, for losses and sacrifices of property, made by the defendant on account of the plaintiff.

The plaintiff's counsel objected to the evidence offered in support of the exceptions, as contrary to the known and settled practice of the court. It would destroy the utility of references, and convert the members of the court into referees.

The defendant's counsel cited *M'Clenachan v. Pringle*, and *Williams v. Craig*. 1 Dall. 313.

By the court. Where injustice has been done, or a plain mistake has been committed, the court has always deemed it their duty to interpose.

In the last case cited, the late chief justice says, "we have always, confined ourselves to two points. 1. Whether there is an evident mistake in matter of fact; or 2. Whether the referees have clearly erred in matter of law." 1 Dall. 315. But how are these errors to be established? Not by unravelling all the accounts between the parties, and examining every particular item in detail! Referees have means of information superior to ourselves, and can devote more time in the development of the truth respecting contested facts, than our official duties can possibly permit us to bestow on the same subject. Every presumption is in favor of an award, and the party who impeaches it on

the ground of mistake, must establish clear errors. Our usage always has been to examine the referees generally, on exceptions to reports, before they receive our sanction, that injustice should not be done; but we have always refused to descend into the minutiae of a disputed account.

The referees were examined accordingly, but the defendant failing to establish any one of his exceptions, the report was confirmed.

Messrs. Ingersoll and Rawle, *pro quer.*

Messrs. E. Tilghman and M. Levy, *pro def.*

ELIZABETH GARRAT, by her next friend, ANDREW TYBOUT *against*
JOHN GARRAT.

Court will not suffer a juror to be withdrawn on the trial of an issue of adultery, on a libel for a divorce, without consent. It is not indispensably necessary to name the *particeps criminis* in a libel for a divorce, founded on a supposed adultery.

Where such libel states the adultery to be committed with E. P. and other lewd women unknown, the times and places and attendant circumstances should be specified in a written notice before trial, without requisition; and if their names should become known, the same should also be specified. The party failing herein, should be confined in the evidence, to acts of adultery committed with E. P.

MOTION to set aside a nonsuit.

The plaintiff filed a libel for a divorce *de vinculis matrimonii*, stating the solemnization of a marriage between her and the respondent, and that he afterwards maliciously and willfully deserted her for four years and upwards. Pursuant to leave obtained for that purpose, she afterwards filed a second libel, wherein she charged the respondent on the 10th June 1799, at the county aforesaid, and at other times and places, with the commission of adultery with Esther Palmer and other lewd women, to the libellant unknown, but whose names she prayed leave to add, when they came to be known.

The respondent in his answer to the first libel confessed the marriage, but denied the malicious and willful desertion. To the second libel, saving to himself all objections to the illegality of it, he denied the adultery charged against him; and recriminated the charge of adultery on the libellant with Benjamin Duffield and other men to him unknown; and averred that after the charge of adultery made against him, the libellant was reconciled to him.

Issues were joined hereupon; and the cause came on to trial at Nisi Prius, in Philadelphia, on the 28th August 1804, before Shippen C. J. and Smith, J., when a witness was called to establish the adultery of the respondent. The court upon argument, directed that the witness should be confined to proofs of adulterous conversation with Esther Palmer, named in the libel; and would not permit him to give testimony of acts of adultery with any other person.

The libellant's counsel then proposed to withdraw a juror, alleging that they had been taken by surprise, and offered to give the most particular notice of the time and place of the commission of the suppose offence. But the court said, this withdrawing of a juror in a criminal case, could not be done without consent:

The libellant then suffered a nonsuit, with leave to move to have it set aside.

This motion was argued at the last December term by Mr. Lewis, for the libellant, and Mr. Frazier for the respondent: and again during the present term, by Mr. E. Tilghman, for the libellant, and by Mr. Ingersoll, for the respondent.

Arguments in support of the motion.

Our act of assembly, passed 19th September 1785, 2 St. Laws 884, "concerning divorces and alimony," is partly penal, but in most instances is remedial. But all laws should be construed in such a manner as that they may be carried into full execution. Such have been the resolutions of the judges under the statutes of Winton, and other statutes.

The construction contended for by our adversaries would defeat the operation of the act in many cases. Suppose a person returning home from a long East India voyage, should find his wife six months gone with child; or a wife receiving the venereal disease from her husband; how are they to obtain relief, if a general charge of adultery in the libel is not sufficient? Receiving information of the name of the party who injured them is but matter of chance. The peace and comfort of married life should not rest on so slender a foundation.

It is objected, that the charge of the libellant is too general. It is at least equally minute, with the answer. It details time and place, the name of the female with whom the supposed guilt was contracted, including other woman to the libellant then unknown. It is special in itself, as much as an indictment need be under circumstances by the rules of law. As to time, the day laid in an indictment is not material upon evidence, if the proof be of a fact done before the time of finding the indictment. 2 Hawk. c. 46, s. 32. As to the place laid, proof of the same crime at any other place in the same county will maintain the indictment. *Ibid*, § 34. A place must be set forth, but the essence of the crime consists not therein, but in the adulterous act. It is submitted to the court, whether the naming of the *particeps criminis* in the libel be either essential or regular. In many instances it would be impracticable, because the party may be unknown; but in all it would be unseemly, because the fairest character of any woman may in this mode, be placed in an ignominious view upon record,

and she have no opportunity of defending her reputation ; thus would the most envenomed malice or unfounded caprice be fully gratified with impunity. But parties to a suit are not allowed to sport with the feelings of others. Cowp. 734:

An action lies against a hundred, charging a robbery by certain persons unknown. 1 Mallor. Mod. Ent. 150, 153. An indictment for keeping a disorderly house, is framed in the most general terms. Stubb's Cro. Cr. Compan. 287. So on a charge of barratry, *ib.* 112, wherein particular facts need not be set forth. 2 Hawk. c. 25, § 59.

The case of Steele v. Steele, 1 Dall. 409, will be cited against us. The court there observed, that on the trial of an issue for cruel and barbarous usage by the husband against the wife, notice ought to be given of the facts intended to be proved on the trial, and recommended it for the future practice of the bar, to give notice that between two specific dates, certain acts of cruelty were ment to be shown in evidence.

We answer that adultery is a specific charge, but that the endangering a woman's life by cruel and barbarous treatment is generally to be collected from a series of distinct facts, which the party should be apprised of before he can be prepared to answer ; and further the court only recommended further practice in such cases without laying down any rule. The practice has not, that we know of, conformed thereto. If here the respondent had wished a statement of particulars, he ought to have required it. *Indebitatus assumpsit* for goods sold, or money received to the party's use, is very general in its nature. If the defendant wants the items of the account, he is bound to apply for a specification. We are not informed of any rule enjoining the necessity of notice of particulars previous to the trial, unless in the case of barratry, where the prosecutor is not suffered to go on in the trial, without giving the defendant a note of the particular matters, which he intends to prove against him. 1 Haw. c. 81. § 13. 1 Bac. 281. 5 Mod. 18.

In 6 Mod. 262, it is stated by Harcourt, master of the crown office, that in the case of barratry, the defendant upon motion, may have a rule to have articles delivered to him of the instances, to which the prosecutor shall be confined upon trial ; and in 1 Ld. Raym. 490, Gould, justice, asserts, that an indictment for barratry being general, and consisting of a multiplicity of facts, the court in justice will compel the prosecutor to assign some particular instances ; and if he proves them, he shall be admitted to prove as many more of them as he pleases, to aggravate the same. The reasoning of Lord Hardwicke in Clark v. Periam, 2 Atky. 337, will be found more applicable to the matter under con-

sideration than any other case in the books. Suppose the case of an indictment for keeping a common bawdy house, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts, and the particular time of doing them. The same rule holds as to keeping a common gaming house. The case of barratry differs from all others, on account of the difficulty of drawing the line between pursuing the defendant as a barrator, and following the course of his profession as an attorney. *Ib.* 339, 340.

Here the adultery with Esther Palmer, and other lewd women, whose names were unknown to the libellant, were put in issue and came on for trial. And though an award be made on a submission of all matters in difference between the parties, it does not "preclude either of them from suing on a cause of action subsisting at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred. 4 T. B. 146.

The libellant's counsel moreover rely strongly on the practice of the court, which has prevailed in several instances of divorce, In *Fiz v. Fiz*, *Goff v. Goff*, and in *Burk v. Burk*, (wherein the libel was filed 22d July 1797) upon charges of adultery generally, no persons were named as partners in the guilt; but notwithstanding, evidence of the parties respectively having broken their matrimonial vows was received. This is the first instance wherein the exception has been taken, or the testimony overruled; and it may well be deemed a surprise on the counsel.

It is not pretended that this nonsuit is final. A new libel may be filed and proceeded upon. If the issues have not been properly or correctly joined, let the pleadings be amended; if notice of the particulars meant to be insisted on at the trial is necessary for the defendant's coming prepared it shall be given in the fullest detail.

It is no answer to the instances of practice we have adduced, to say, that they were *ex parte*, and passed *sub silentio*; for in such cases the court are directed by the 3d section of the law, to proceed by the examination of witnesses, on interrogatories, exhibits, or other legal proof. And by the 6th §, it is also provided, that the court shall hear and determine every cause commenced before them by virtue of this act, as to law and justice shall appertain.

The denial of a new trial will only add fresh irritation to the feelings of the parties, create delay and enhance costs.

On the part of the respondent, it was answered, that nothing could be of more moment to the liberty of the citizen, than a rigid adherence to the rule of stating charges for criminal offences, with accuracy

and precision. It has been fully shown, that a variance between the time and place laid in an indictment, and the evidence brought in support thereof, is immaterial ; and from thence it is attempted to be inferred, that the name of the party, without whose co-operation the guilt could not be contracted, may well be omitted. Indeed the position attempted to be established goes further, that a crime may be laid to be committed with one person, and then under general expressions, which can convey no idea of a particular charge, and without the smallest intimation of the precise offence to which the proof will be directed on the trial, that evidence should be received to convict a party of a crime, against which he could not possibly shape his defence. It will scarcely be asserted, that upon an indictment for felony, charging a party on a certain day and at a certain place, with stealing the goods of E. P., and at other times and places with stealing the goods of other persons, to the jurors unknown, testimony would be admitted to establish the latter charge therein.

It is necessary that charges should be fully and accurately designated, to exclude the dangers of arbitrary decision, and to prepare the suspected for their defence. A due adherence to the form of indictments is founded in a prudent and a virtuous principle. 2 Woodes. 554. Offences must be particularly and certainly expressed in indictments, for no one can well know what defence to make to an uncertain charge. 2 Hawk, c. 25. s. 59. 1 Bac. 281.

It has been well remarked, that three things ought to concur in every criminal proceeding. 1st. That the party accused should be apprised of the charge he is to defend ; 2dly. That the court might know what judgment was to be pronounced according to law ; and 3dly. That posterity might know what law is to be derived from the record. The charge must communicate intelligence to the defendant of the offence, which he is to meet on his trial ; otherwise it is bad. 5 T. R. 623, 4.

The offence of barratry, in nature of the thing, consists of the repetition of several acts. 1 Hawk. c. 81. s. 11. It is a multiplicity of acts.. 1 Lord Raym. 490. It would be too prolix to enumerate them in one indictment ; and therefore it is settled to be sufficient to charge a man generally as a common barrator, and before the trial to give the defendant a note of the particular matters, which you intend to prove against him. 2 Hawk. c. 25 s. 59. A previous motion for this purpose is now exploded : it is the settled course of courts of justice.

It has been contended, that notice of the special facts intended to be proved on trial, extends only to the offence of barratry. But the court have laid down the rule in cases of di-

voice, as appears by the case of *Steele v. Steele* already cited. The principle on which the rule was originally adopted, extends to both cases, and is founded on the first elements of justice. Few issues have been tried on petitions for divorce; and it does not appear that the recommendation of the court, as it has been called, has not been complied with.

As to the three precedents which have been so much relied on, they fall within the remark of Lord Mansfield, of not being professed or deliberate determinations. 4 Burr. 2068. They certainly were not formed, decisive, resolutions upon argument. The terms in which the libels were couched, were in all probability unknown to the court. No defences were made.

As to Atkyns's Reports, they have been refused as authority in the King's Bench. 1 W. Bla. Rep. 571. The rules of evidence are not the same in equity as at law in all cases, owing to the difference of judicatures. 2 Fonbla. 452. Note.

In a late case in 1 Term Rep. 741, it was held, that to publish a man as a swindler was a libel, and actionable; but that a justification of such a charge must state the particular instances of fraud by which the defendant meant to justify the publication. The reasoning of the judges in this case will be found more fully applicable to the matter under consideration, in point of real principle, than that cited from 2 Atky. 339.

Whoever will peruse Boyd's Judicial Decisions in Scotland, will be fully satisfied, that our act concerning divorces and alimony was extracted from the Scottish law. It pursues the latter minutely, and the same causes of divorce exist in both countries. Boyd 113, 114. The 7th section of our act which provides, "that he or she who hath been guilty of the adultery, may not marry the person with whom the crime was committed, during the life of the former husband or wife," is evidently borrowed from the Scotch oath of calumny. Ib. 121, 122. How is this to be legally ascertained, unless the name of the *particeps criminis* be inserted in the libel? The 8th section of our act contemplates this expressly, when it directs, "that where any woman shall be divorced as aforesaid, and shall afterwards openly cohabit at bed and board with the person named in the petition or libel," she shall be incapable of alienating her lands by deed or will. The intention of the legislature therefore in this particular cannot be mistaken; and it would be wild to suppose, that the names of women or men are introduced into such libels, from malice or caprice, merely to wound the feelings of innocent persons. In the Scotch precedents, the particular times and places of the offence, and the names of the co-offenders are uniformly mentioned. Boyd 114, 117, 119, 120, 121, 122. And such is our settled form in indictments for adultery.

A libel on the same ground should pursue the same strictness, to give the party accused the same opportunity of a full defence. The act of divorces is highly penal in some of its provisions. The plea of necessity has done infinite injury in criminal cases. The libel here does not charge the respondent with general lewdness, but with specific acts of adultery with a person named therein.

Shippen, C. J. and Smith, J. who sat on the trial, referred the decision of the motion to the other justices. And Yeates, J. pronounced the opinion of the court, to the following effect:

I perfectly concur in opinion, with the judges who tried the issues in this libel, that it would be highly dangerous to the citizens in general, if they were compelled to answer to criminal charges, without being informed of the specific offences, against which they were called upon to defend themselves.

Common sense is in unison with the constitution, when it declares, "that in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, and to demand the nature and cause of the accusation against him." Declaration of Rights, § 9. At the same time, I fully concur in the sentiment expressed by my brother Smith, on the trial, that it is not indispensably necessary, to name the *particeps criminis* in the libel for divorce, founded on a supposed adultery. But if it be stated to have been committed with E. P. and other lewd persons, to the libellant unknown, if their names are afterwards known, written notice of them and of times and places should be given to the respondent, a reasonable time before the trial, without requisition. If their names are really unknown, the times, places and attendant circumstances should be contained in the specification, so as to give the party charged a fair opportunity of defence against the accusation. Failing therein, I think the complainant should be precluded from giving particular instances in evidence on the trial, on a general charge. Thus the essentials of justice would be preserved, and the party being forewarned of the specific offence, would have a full opportunity of showing his innocence; and the feelings of individuals, whose names might be inserted on the record on the slightest grounds, and who have no opportunity of defending themselves, would remain unwounded.

The practice of this court has not conformed to what I have already mentioned to be my ideas on this subject. In some libels, a general charge has been made, and the evidence has gone into particulars. The court have therefore adopted it in those instances, as legal proof under the act. In some cases, the names of the paramours may be wholly unknown, although the proof of the crime against the

party charged may be of the most cogent and unequivocal nature.

We may fairly suppose, that the objection to the evidence offered to the court on the trial, was a surprise on the libellant's counsel. I should strongly be inclined to adhere to the strict rule of evidence in future. But viewing the present libel under all its circumstances, and the practice which had before obtained, I am of opinion, that the nonsuit should be set aside. It is admitted, that a new libel may be filed, to bring the present matter before a jury. This would produce delay, and increased expense; and I think it better for the parties, that the nonsuit be set aside, and the evidence be fully heard in this action, on a complete and detailed specification.

Brackenridge, J. concurred.

Nonsuit set aside.

In December term 1805, the libellant withdrew her second libel for adultery, and the respondent also withdrew his answer thereto, and confessed the fact of willful and malicious desertion and absence, without a reasonable cause, for the term of four years; whereupon the parties were divorced, on motion.

UNITED STATES of AMERICA *against* WILLIAM NICHOLLS.

The 5th section of the act of congress of 3d March 1797, directing that "debts due to the United States, shall be first satisfied," does not extend to cases where a particular state has a lien.

MOTION by Mr. M'Kean, attorney general, to take 14,503 dollars arising from the sale of the defendant's lands by the sheriff, out of court.

This motion was opposed by Mr. Dallas, who filed a claim in behalf, of the United States, to the money, as attorney of the United States for the district of Pennsylvania, under the execution, and divers acts of congress, and particularly of the act of 3d March 1797.

The facts were admitted to be as follow:

The defendant, Nicholls, being indebted to the United States of America, on the 9th June 1798, executed a mortgage to Henry Miller, supervisor of the revenue for the district of Pennsylvania for the use of the United States, in the sum of 59,444 dollars, conditioned for the payment of 29,271 dollars, whereof 9,757 dollars were payable on the 1st January 1799, other 9,757 dollars on the 9th June 1799, and the remaining 9,757 dollars on the 9th September 1799.

A *scire facias* was issued upon the said mortgage, returnable

to September term 1800, in this court and judgment was entered up thereon, on the 6th March 1802. A *levari facias* issued thereupon and was levied upon the lands of the said William Nicholls; and the same being sold by the sheriff to the highest and best bidder for the sum of 14,530 dollars, the money was brought into court, and is now deposited in the hands of the prothonotary of this court, subject to the order of this court.

Previously hereto, on the 31st December 1797, the accounts of the said William Nicholls, with the commonwealth of Pennsylvania, were settled by the comptroller and register general of this commonwealth.

An appeal from the said settlement was filed in the office of the prothonotary of the Supreme Court, on the 6th March 1798, and judgment was afterwards entered in this court on the 6th September 1802, in favor of the commonwealth, against the said William, in the sum of \$9,987 15.

On the 12th May 1802, the said William Nicholls, executed an assignment of all his estate real and personal, to John Baker, William Turnbull and Tench Coxe, in trust for his creditors; and on the 28th of the same month, a commission of bankrupt issued against him, upon which he obtained afterwards a certificate of conformity.

The motion was argued at the last term by Mr. M'Kean, for the commonwealth, and by Mr. Dallas, for the United States.

The arguments for the commonwealth, were substantially as follow:

It has been decided in this court between Smith and Nicholson, on full argument, that the general lien created by the comptroller's settlement of an account, by the act of 18th February 1785, (2 St. Laws, 251,) is not repealed either by the express words of, or any necessary implication arising from, any subsequent law passed on the subject. On the true exposition of this act, the state founds her claim to the prior lien on the real property which has been sold. It is not grounded on the judgment of a court of record upon the appeal, but on the settlement made by the department of accounts, which was confirmed on the appeal. Hence it is, that the act of 4th April 1798, (4 St. Laws, 300,) which provides that judgments shall have no effect beyond five years, unless there has been a *scire facias* thereon, is wholly inoperative here. No *scire facias* could issue from the office of the comptroller general, to revive the settlement.

I make two positions. 1. That the United States cannot constitutionally take priority of an individual state in payment of debts; but that in all events, they cannot enact a law, defeating the pre-existing rights or liens of any of the states.

2. If such right or lien of a state can be thus defeated constitutionally, the act of congress of 3d March 1797, (3 U. S. Laws, 421,) is not applicable to the case before the court.

I. The primary enquiry will be, from whence do congress gain this right of priority ?

Under the old confederation agreed to in congress, November 15, 1777, 3 Journ. Cong. 502, but not ratified by Maryland, till March 1, 1781, no state was to lay any imposts or duties, which might interfere with any stipulations in treaties entered into by congress, (art. 6,) but the taxes for paying the proportion of the several states, for the common defence or general welfare, were to be laid and levied by the authority and direction of the legislatures of the several states. (art. 8.)

The legislature therefore had an unquestionable right to enact the law of 18th February 1785, for the better security of her own revenue.

Has she since surrendered up her right, either by the adoption of the constitution of the United States, by the formation of her new frame of government, or by the bill of rights reserved to the people ?

It will not be pretended, that this has been done by either of the two last instruments. The restrictions on the powers of the several states are contained in the 10th section of the 1st article of the constitution of 1787. The powers granted to congress are to be found in the 8th section of the same article.

The states in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions. 1 Federalist, No. 32, 33. This construction has since been fully confirmed by the 12th article of amendments, which declares " that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

This article was added " to prevent misconstruction or abuse " of the powers granted by the constitution, rather than supposed necessary to explain and secure the rights of the states, or the people.

It cannot be said that congress have acquired a right to secure to the United States priority of payment over individual states by the express words of the constitution ; but it will be contended, that by concluding clause, congress, have power " to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all others powers vested by the constitution in the government of the United States, or in any department or offices thereof. "

The plain import of this clause is, that congress shall have all the incidental or instrumental powers, necessary and proper for carrying into execution all the express powers ; whether they be vested in the government of the United States, more collectively or in the several

departments, or officers thereof. It neither enlarges any power specifically granted, nor is it a grant of new powers to congress; but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant. Wherever a question arises on the constitutionality of a particular power, if it be not expressed, the only inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by congress; if it be not, congress cannot exercise it. 1 Tuck. Bla. Append. 287, 288.

The question is then asked, to what express power, is this claim of priority in payment an incident, and necessary to its execution. Is it necessary and proper, in order to lay taxes, to declare war, to raise and support armies, to provide and maintain a navy, &c. &c., that the vested rights and interests of individual states should be sacrificed to the general union? Admit the principle asserted by the attorney for the district, and there can be no security to any state. She could trust no man, or set of men in monied concerns, lest they might become debtors to the United States.

The funds of the state might be diverted from their proper channels, to make up the deficits in the revenues of the union. A state cannot be sued, and yet without the formality of a suit, she might be deprived of her just rights in this mode.

But the constitution of the United States must be construed strictly when the antecedent rights of a state may be drawn in question. 1 Tuck. Bla. Append. 257. Individual states possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. 1 Federalist, No. 32, pa. 201.

II. The liens of the United States and of each distinct state should be paid and satisfied in their natural order, as they attached respectively.

Thus if congress and this state should lay a direct tax upon lands, and provide that the property should be bound by the assessment, the first assessment must be first discharged.

In this case, the settlement of the defendant's account by the comptroller and register general, preceded the mortgage to the supervisor, five months and nine days. The mortgage merged and extinguished the original debt of the defendant, and the taking of it showed this to be the sense of the revenue officers. It might be said with equal propriety, that the original debt bound the lands of Nicholls, which had not been described in the mortgage, as to assert that the original debt still continued a lien after a sealed instrument had been given in lieu thereof. The 5th section of the act of congress of 3d March 1797, is

much relied on. But it respects debtors of the United States becoming insolvent, or the estate of a deceased debtor in the hands of executors or administrators, insufficient to pay all the debts. Here the money is in the hands of the sheriff, who has paid it in a court, and not in the hands of assignees, of executors or administrators. The act contemplates revenue officers, &c. indebted generally, and does not regard those cases, where their property is under previous incumbrances. It is not provided, that a judgment creditor shall lose his lien, nor was any such thing intended. By such extension of the general expressions, mortgages and executions executed would be defeated, in favor of the union; they are all securities for the payment of debts. The priority of payment secured to the United States on every reasonable ground of construction, relates solely to property belonging exclusively to such insolvent, or to the personal representatives of the deceased debtor, over which they had dominion and control.

Should however this construction not obtain in the case of individual creditors, it is insisted, that the act is not applicable in the case of distinct states being creditors. The most clear and explicit words are necessary for such a purpose.

The sense of the union on this subject is fully shown in the bankrupt act of the 4th April 1800. 5 U. S. Laws 45. The 62d section expressly saves the right of the United States, and of each state to their debts; and the 63d section saves all existing liens at the time of passing the law.

In the case of the United States v. Fisher and others, lately determined at Washington, there was no existing lien; nor was the question as to a particular state retaining its lien against the United States judicially before the court. Here it is evident that the commonwealth founds her claim to the money, on a lien legally and constitutionally created by the settlement of the comptroller and register general on the 31st December 1797. But the United States only claim from the assignment made on the 12th May 1802, or from the date of their mortgage.

Arguments in opposition to the motion.

The authority and legal right of this court to declare a law of this state, or of the United States, to be unconstitutional, is not doubted. But it must be on the clearest and plainest grounds, not on the ground of expedience.

The 6th article of the constitution of the United States, has declared, that "the constitution and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in

the constitution or laws of any state to the contrary notwithstanding." If the act of 3d March 1797, is made in pursuance of the constitution, it must prevail, according to its true meaning.

Almost every state in the union has secured a preference to themselves, in the payment of debts. Under an old law of Pennsylvania, the king and proprietaries were to be first paid.

The same preference continued here to the commonwealth, since the revolution, until the passing of the act of 19th April 1794, 3 St. Laws, 521, by the 14th section whereof, it is altered. Why then is congress found fault with, for doing what almost every state has done? Whence flowed the power of passing the act in question, unless it be considered as an incident of government? It is a measure of policy, that congress should possess this power. They declare war, raise and support armies, provide and maintain a navy, and protect the union, in its internal and external relations. Money cannot be drawn from the public treasury, without an express appropriation. The debts of the union must be paid by the government with good faith.

In the case cited, between the United States and Fisher and others, assignees of Peter Blight, the chief justice in delivering the opinion of the majority of the Supreme Court, justly observed, "that in construing the clause of the constitution, authorizing congress to make all laws, which shall be necessary and proper for carrying into execution the powers vested by the constitution in the government of the United States, or in any department or offices thereof,"—"it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized, which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means, which are in fact conducive to the exercise of a power, granted by the constitution."

"The government is to pay the debts of the union, and must be authorized to use the means which appear to itself most eligible to effect that object."

"This claim of priority on the part of the United States, will, it is said, interfere with the right of the state sovereignties respecting the dignity of debts and will defeat the measures which they have a right to adopt to secure themselves against delinquencies, on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested, so far as it really can happen, is the necessary consequence of the supremacy of the laws of the United

States on all subjects, to which the legislative power of congress extends."

It is true, there was no existing lien in that case; nor was the question as to a particular state retaining its lien against the United States, then immediately before the court for decision. But the reasoning of the majority of the court necessarily sprung out of the subject before them, and it is presumed, is unanswerable.

The act of congress of 3d March 1797, relates generally to the collection of the debts of the United States, without viewing the other engagements of the debtors. The 5th section refers to insolvencies, and the estates of deceased persons, and declares that debts due to the United States, shall be first satisfied, and that the priority thereby established, shall be deemed to extend, as well to cases, in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

Here has been an assignment under all these circumstances, and a complete act of bankruptcy, which vests the priority of payment in the union. This priority attaches on the property, as it is found at the time of insolvency. If the debtor has mortgaged his lands, the legal estate is no longer in him, but he retains the equity of redemption. If he has pledged his goods, they are bound thereby to the pawnee. But judgments unexecuted, come in equally with other debts, under the provisions of the bankrupt law.

No retrospective construction of the act of 3d March 1797, is insisted on. On the passing of that law, the United States obtained a constitutional preference of payment. The supervisor of the district having accepted a mortgage from the debtor, does not extinguish this right of preference, but it remained in *statu quo*.

The commonwealth made no claim under their old running account, until after this mortgage was taken. But the claim of the United States was on record, a matter of public notoriety.

The state law of 18th February 1785, created a lien in favour of the state upon settlement of the account by the proper department; but it was suspended by the appeal, until judgment was entered thereupon on the 6th September 1802, in this court.

If this judgment had been in favour of an individual, and an act of bankruptcy had been afterwards committed by the debtor, no difficulty could have occurred, as to the preference claimed by the United States; and it is apprehended, that the claim made by the commonwealth can form no essential difference.

The question is of great magnitude. Should the opinion of the
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court be in favor of the commonwealth, it is required that the record should be in such a form, as that it may be removed to the High Court of Errors and Appeals, that a writ of error may, if necessary, be issued thereupon by the Supreme Court of the United States, under the 25th section of the act of congress passed 24th September 1789. 1 U. S. Laws 63.

The matter was continued under advisement ; and this term the opinions of the court were delivered *seriatim*.*

Yeates, J. I cannot bring myself to believe, notwithstanding the generality of words used in the 5th section of the act of congress of 3d March 1797, " the debts due to the United States, shall be first satisfied," that the provision therein contained was ever intended to extend to cases where an individual state was a creditor, and as such was clearly entitled under its municipal laws to a lien on the estate real or personal, of the insolvent debtor. No section or clause in any part of the act respects in the most distant manner the several states in their political and corporate capacities, as competitors with the United States ; but on the contrary, every regulation and provision in the act is confined to the settlement of accounts, between the United States and individual citizens.

It has been truly said, that the constitution of the United States, considered as federal, is to be construed strictly in all cases, when the antecedent rights of a state may be drawn in question, Tack. Bla. Append. 151 ; and it is a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication, nor in any, manner whatever, but by their own voluntary consent, or by submission to a conqueror. *Ib.* 143. It would certainly require strong, clear, marked expressions, to satisfy a reasonable mind, that the constituted authorities of the union contemplated by any public law, the divesting of any pre-existing right or interest in a state ; or that the representatives of any state. would have agreed thereto, even supposing the legitimate powers of congress in such particular, to be perfectly ascertained and settled.

The members of this court were unanimously of opinion, in *Smith v. Nicholson*, December term 1803, that the provision of the general lien, created by the act of assembly of 18th February 1785, on the settlement of an account by the comptroller general, continued in full force, and was not repealed either by the express words of any subsequent law, or by necessary implication. When the powers of the Supreme Executive Council became vested in the governor, the necessity of the governor's de-

* *Absente*, Chief Justice.

cision in the settlement was wholly superseded, unless the comptroller general should disapprove of the settlement made by the register general.

The legislature of this commonwealth had the unquestionable right to make such a law in 1785, to secure the fiscal interest of the state. This power was not delegated to the United States amongst the other enumerated powers, nor prohibited to the state by the constitution of 1787. But congress was authorised by act 1. s. 8 of that instrument, "to make all laws which should be necessary and proper for carrying into execution the powers delegated to them, and all other powers vested in the government of the United States, or in any department or officer thereof." Hence it results that congress have the concurrent right of passing laws to protect the interest of the union, as to debts due to the government of the United States arising from the public revenue; but in so doing, they cannot detract from the uncontrollable power of individual states to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent state. Federalist Letters, No. 32, 33. The consequences of a contrary doctrine are too obvious to be insisted upon.

The regulations and provisions in the bankrupt act of congress of 4th April 1800, strongly fortify in my mind the construction I have made of the act of 8d March 1797. The 31st section declares, that in the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion rate according to the amount of their respective debts. Creditors having judgments (on which executions have not been executed) statutes, recognizances, specialties or attachments are placed on one common footing; "they shall be entitled to no more than a rateable part of their debts, with the other creditors of the bankrupt." The 62d section saves the right of preference to prior satisfaction of debts due to the United States, or to any of them. And the 63d section provides, that nothing "contained in this act shall be taken, or construed to invalidate or impair any lien existing at the date of this act, upon the lands or chattles of any person who may have become a bankrupt." The rights of the general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This only can be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured.

This, if my construction be correct, narrows the question before us to a simple point, viz. To what periods, do the liens relate in the

present case? If the lien of the United States on the property of William Nicholls, can be traced no further back in this instance than the date of his mortgage to Henry Miller on the 9th June 1798, then the settlement on the 31st December 1797, of Nicholls's account by the comptroller and register general, being previous thereto, must necessarily give this commonwealth a preference; but, if this lien refers to March 1797, then the United States would be entitled to priority.

Considering this point as a question merely between the United States and the commonwealth of Pennsylvania, I am of opinion, for the reasons I have mentioned, that as to the contending parties, the lien did not attach earlier than the execution of the mortgage, and consequently, that the motion of the attorney general to take the money arising on the sheriff's sales, to the extent of the debts due from the defendant to the commonwealth, out of court, be granted.

Smith, J. I fully concur. The reasoning from the 62d section of the bankrupt act did not at first carry the same weight in my mind as it now does.

Brackenridge, J. I wished to have seen the opinion of Judge Washington in the case of the United States v. Fisher and others and also that delivered as the opinion of the majority of the judges of the Supreme Court, and to have compared both opinions with the constitution and the act of congress. I have had no such opportunity, and therefore have made out no regular opinion.

My mind has been led to the origin of the question before us. The constitution of the United States restrains the powers of the general government. Is this power to make such a law, or the exercise of it, given by the constitution? Is it necessary and proper to carry into execution the other delegated powers? I think not. Let the United States take care to appoint proper officers with due securities. I agree that the constitutionality of a law is not to be lightly condemned.

But admitting the constitutionality of the present act, has the public will been clearly and sufficiently expressed? Does the act extend to all persons indebted to the United states, or only to revenue officers? The claim of priority in payment of debts is a prerogative odious to all. It is strange how it found its way into a republican government! I lean against the construction of a priority in the United States; and I think the act only extends to revenue officers, and was never intended to dissolve a lien existing in a sovereign independent state. The word per-

son in common parlance does not mean a body politic, a state in its collective capacity.

I never believed that there was any humiliation in a state by being subjected to suits by citizens of another state, or by citizens or subjects of any foreign state, in the courts of the United States; because I always deemed them on a level. The difficulty in my mind was, how the judgment against a state could be enforced. An amendment has taken place in this particular in the constitution of the United States.

If even the power was constitutionally delegated to congress to make a law, giving to the United States a preference in payment of debts over individual states, I cannot conceive that this right has been exercised by the expressions of the act of 3d March 1797; and upon the whole, I think the attorney general is entitled to take the money out of court.

Motion granted.

HANNAH MOORE *against* FREDERICK HEISS.

Eight days notice of the execution of a writ of inquiry of damages is to be served personally. On foreign attachments the notices are put up in the prothonotary's office.

MOTION to set aside inquisition of damages, finding for the plaintiff 574 dollars for the maintenance of a bastard child. Several objections were made thereto; but the one relied upon was, that there had been but four days notice given of the execution of the writ. In England, if the defendant lives within 40 computed miles from London, there must be eight days notice of inquiry, exclusive of the day it is given. 1 Tidd's Pract. 319. And such is the practice of Pennsylvania.

This was denied by the plaintiff's counsel.

But the prothonotary and all the elder practitioners present at the bar, certifying that it had been the uniform practice to give to the defendant eight days notice of the execution of the writ of inquiry, except in foreign attachments, wherein the notice was put up in the prothonotary's office; the inquisition was set aside by the court.

Messrs. J. Sergeant and Browne, *pro quer.*

Messrs. Rawle and Milnor, *pro def.*

[*Absente*, Shippen, C. J. and Brackenridge, J.]

A second inquisition was afterwards executed, finding for the plaintiff six cents damages, and six cents costs.

AT A CIRCUIT COURT, HELD AT SUNBURY, OCTOBER 1805.

CORAM—YEATES, JUSTICE.

Lessee of GEORGE IRWIN *against* GEORGE BEAR and EVAN OWEN

Recitals in a patent of sundry transfers of a location, no evidence against a prior patentee of the same lands.

Whether a warrant or application describes a certain tract of land or not, can only be judged of by the words of it; but the sentiments of people as to certain streams of water, or their names in early times, may be given in evidence.

EJECTMENT for 84 acres of land in Fishing Creek township. The plaintiff claimed under an application, in the name of William Patterson, cooper, for 300 acres of land, on the N. E. branch of Susquehannah, near the mouth of Fishing Creek, adjoining land applied for by William Barton and Francis Stewart, dated 3d April 1769, No. 390. A survey was made thereon on the 22d August 1769, one mile from the mouth of Fishing Creek; and on the 20th January 1789, a patent issued to the lessor of the plaintiff, reciting a deed poll from the said William Patterson to William West, dated the 6th September 1773; one other deed poll from the said West to Alexander Roddy, dated 7th December 1774, and one other deed poll from the said Roddy to George Irwin aforesaid.

The defendants claimed under an application in the name of Thomas Hughes, for 300 acres of land in the second forks of Fishing Creek, dated 3d April 1769, No. 2689; a survey thereon on the 14th September 1769; a deed poll from the said Thomas Hughes to Evan Owen, dated 14th August 1773, and a patent thereon to the said Evan Owen, dated 12th October 1773.

The plaintiff's counsel offered his patent in evidence, without producing the deeds poll in evidence, transferring the interest in the application. The defendants' counsel objected to it, in as much as they claimed under an earlier patent from the proprietaries, dated 1773, and therefore the patent of 1789 was no evidence against them.

Per cur. I cannot hinder the reading of the patent; but what use is to be made of it is another thing. *Ford v. Lord Grey.* 6 Mod. 45.

The recitals therein are not evidence against the defendants, as the case stands before me. This however appears to be a surprise on the opposite counsel, who produced those deeds at a former trial in October 1795, against another of Owen's tenants, and therefore I should recommend the waiving of the objection, and the trial of the cause to proceed on its merits. The objection was waived accordingly.

The point chiefly in controversy was, as to the relative merit

of the applications, whether they were descriptive of the lands in question.

The defendants objected that Patterson's application called for lands near the mouth of Fishing Creek, and that this survey was one mile distant therefrom, with a large tract on the river intervening. The plaintiff objected, that Hughes's application described lands seven miles above the tract in dispute, by calling for the second forks of Fishing Creek.

The counsel for the defendants offered to show in evidence, that Thomas Hughes, the original owner of the application, in his name, and who made the discovery thereof, was, when he made the description thereof, on a certain stream of water running through the land in question, and that the said stream of water was then considered by him and the people with him as the second fork of Fishing Creek; and that then sitting upon a log on the land he made the description thereof, which was inserted in his application. The plaintiff's counsel excepted to this evidence, and the objection was argued.

Per cur. Part of the testimony offered is admissible, and part thereof is inadmissible.

The sentiments of the people as to streams of water, and the names whereby they were usually called, at an early day when the country was unexplored, may certainly be given in evidence; and due allowance will be made for inaccuracies in these particulars; but this indulgence must be confined to reasonable bounds; it cannot vary the locality of the lands described in a warrant or application.

The decisions have uniformly been, that such inceptions of right must be judged of *ex visceribus suis*, from what appears on the face of them. Whether they sufficiently describe or locate precisely particular lands, can only be determined by comparing the terms wherein they are expressed, with the natural or artificial boundaries described therein; and these boundaries must be ascertained by evidence, either written or oral. It is of no avail what the intention of the party is, if he does not reduce it to writing when he applies for the lands, though his intention may be given in evidence against him to defeat his claim to other lands, than those he really meant.

These rules are bottomed on sound policy, and conduce to justice, common safety and public convenience. A contrary practice necessarily tends to error, litigation, fraud, and perjury. A contract is the act of two minds; it either binds both parties, or is obligatory on neither. The vendors of lands, whether they be the general lords of the soil or private individuals, are bound by the plain meaning of their written contracts. If the description of lands be materially and radi-

cally defective, and naturally lead to mistake, the party applying must impute his misfortune to himself. How can any man safely lay out his money in taking up lands, unless by applying to the public offices, he can discover whether the lands have been before appropriated? He cannot penetrate into the bosoms of others, nor receive information, that a particular tract not described in a location, was intended by the party, sitting on a log lying on the land.

The latter part of the evidence offered must be overruled.

The defendant's counsel proposed to take a bill of exceptions, which was assented to. But nothing further was said of it.

Verdict for the plaintiff.

Messrs. C. Smith and Hall, *pro quer.*

Messrs. Duncan and D. Smith, *pro def.*

MICHAEL ALBRIGHT *against* TOBIAS PICKLE.

In replevin, on the issue of rent in arrear, the jury ascertain the sum due to the avowant for rent, and are not confined to the value of the goods distrained: and in such case may allow interest from the time of the replevin sued out.

REPLEVIN for one poplar chest, one pine chest, one feather-bed, one chaff-bed, and one green bedstead.

The defendant avowed for rent in arrear.

The plaintiff replied that no rent was in arrear.

The defendant's counsel having established the contract to pay the rent, contended, that they were entitled to recover the whole sum, with interest from the time of bringing the suit.

The plaintiff's counsel insisted, that the avowant could only recover the value of the articles distrained, his remedy being by the writ of *retorno habendo*. The stat. of 17 Car. 2. c. 7, has altered the law in the particular; and the jury shall at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods and cattle distrained, and thereupon he shall have judgment for such or so much thereof, as the goods and cattle distrained amount to. Bull. 58. The case of *Rees v. Morgan* fully shows this; where the amendment prayed for, was to enter the finding by the jury, that the rent in arrear amounted to 195*l.*, and the cattle distrained to the same value, which the court granted. 3 Term. Rep. 349. If the jury should find a sum in arrear exceeding the value of the articles distrained, a judgment thereon cannot be enforced by any execution known to the law, and would therefore be of no effect.

By the court. The issue joined is, whether any, and what rent is in arrear: and I do not see how the jury can be prevented from ascertaining it. Whether the verdict can be enforced by execution or otherwise, is another consideration.

The statute of 17 Car. 2. c. 7, extends to cases, where a plaintiff in replevin, whose goods have been distrained for rent, is non-suited before, or after issue joined. The statute does not alter the judgment at common law, but gives a further remedy to the avowant. 2 Wils. 117 Carth. 253. On a verdict for the avowant, the jury in that verdict ascertain the damages, Gilb. on Dist. and Repl. 169. 2d. ed. and then there needs no writ of enquiry; but the judgment is entered, that the defendant have a return of the cattle or goods taken, and that he recover against the plaintiff 1. for his damages by the jury aforesaid in form aforesaid assessed, and also . . . 1. for his charges and costs.

Our act of assembly of 21st March 1772, 1 St. Laws 612, pursues in many particulars, the British statute of 11 Geo. 2. c. 19, and the 11th sect. of the former is couched nearly in the same terms, with the 23d section of the latter. The sheriff is directed to take a bond in double the value of the goods distrained, conditioned to prosecute the suit with effect, and to return the goods distrained, in case a return shall be awarded; and the same being assigned to the avowant, he may recover thereupon in his own name, "and the court where such action shall be brought, may, by a rule, give such relief to the parties upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond."

This mode of proceeding is now generally preferred, and is not affected by the former stat. of 17 Car 2. c. 7. Gilb. on Dist. 178, 2 Wils. 42. Therefore it would seem, that in such a case as the present, the avowant would not be without relief, to the extent of the penalty of the replevin bond. He is not bound to sue out his writ of *retorno habendo*, though a judgment of return is entered for him as a matter of course.

It is not the usage in this state to allow interest on rent; but from the time the landlord distrains or sues for it, it is customary for the jury to make such allowance. The practice is right and proper in itself. Where one unreasonably and vexatiously delays another from the recovery of his just debt, the least compensation he can make, is to pay interest for the delay he has thus given.

Verdict *pro* defendant for 121l. 6s. 6d. the rent in arrear, interest being calculated from the time of suing out the replevin.

The plaintiff's counsel afterwards filed reasons in arrest of judgment.

1st. For that the jury have not found the value of the goods distrained.
2dly. For that the avowry is not for any sum certain; and does not state for what lands or tenements the same rent arises, or when the same became due.

On argument, Yeates, J. adhered to the opinion he gave on the trial, and observed as to the second reason, that it had been the uniform practice to enter such avowrys generally on the docket. Vid. 4 Term Rep. 509; Gamon v. Jones et al. He therefore overruled both reasons and directed judgment to be entered for the avowant, according to the form he had mentioned.

Messrs. Duncan, and C. Hall, *pro quer.*

Messrs. Watts and D. Smith, *pro def.*

Lessee of FREDERICK PIGOU *against* NICHOLAS NEVIL and JAMES GRAHAM.

Improvements made on lands after an early descriptive adverse warrant and a survey returned, cannot be received in evidence against a distant owner.

EJECTMENT for 350 acres of land in Buffalo township.

The plaintiff claimed under a descriptive warrant in the name of Ludwig Karcher, dated 25th October 1774, and a survey made thereupon on the 27th April 1775, which was returned into the surveyor general's office on the 12th March 1776.

The defendants' pretensions rested on a later descriptive warrant granted to Conrad Sharpe, on the 26th October 1774, and a survey thereon made 8th November 1774, but the time of its return did not appear.

The defendants showed in evidence without opposition, that Sharpe came upon the lands in October 1775, cleared 8 or 4 roods square, felled some trees, planted a few apple seeds, and raised part of a cabin four logs high. They then offered to prove the extent of the improvements made on the lands since October 1775, up to the time of bringing the ejectment in 1800, which was opposed.

Yeates, J. I am constrained to overrule the testimony. Improvements made on lands in dispute, after an adverse early descriptive warrant had issued, and a survey made thereupon which has been returned into the surveyor general's office within 10½ months afterwards can give no pretence of equity against the distant owner, and can only serve to mislead the jury.

Verdict *pro quer.*

Messrs. Duncan and D. Smith, *pro quer.*

Messrs. Hall and Evans, *pro def.*

AT NISI PRIUS, IN PHILADELPHIA, NOVEMBER, 1805,

CORAM—YEATES, SMITH AND BRACKENRIDGE, JUSTICES.

RESPUBLICA *against* JOSEPH DENNIE.

The court will not question the jury before they are sworn, whether they have prejudged the cause, but will admonish them if they do not stand indifferent to either party that they should disclose it to the court. It is no libel to publish the truth from good motives, and for justifiable ends, though it reflect on government or the magistrates. Aliter, when done with an evil intent.

An indictment was found in July sessions 1803, in the Mayor's Court for a libel, which was removed into the Supreme Court in December term 1803.

The prosecution was ably conducted by Mr. M'Kean, the attorney general; and the defence was supported with equal ability, by Messrs. Ingersoll and Hopkinson, who went fully and at large into a defence of the freedom of the press, and the rights of citizens to communicate their thoughts and opinions on all subjects of a political nature, for public information.

Previous to the jury being sworn, the counsel for the defendant stated, that they had received information, that some of the jurors impanelled had declared their opinions in ward meetings on the present publication; and moved the court, that the question should be proposed to them before they were sworn, if they had so declared themselves; as was done in the second trial of John Fries, on the prosecution of the United States. Printed Trial, 177. This was done on the trial of Lord Balmerino, for a libel in Scotland. 1 St. Tri. 470-1.

The motion was opposed by the attorney general, who contended, that it was not proper that such question should be put to the jurors, as it involved discredit on them, and that no such practice had ever obtained in the English courts.

The court refused to put the question to the jurors: but they publicly declared,* that if any of the jurors in the box did not feel themselves indifferent to the defendant, or had prejudged the cause, or had so declared themselves, it was their duty to mention it to the court, to be judged of by them. It must be the wish of every honest mind, that a fair and impartial trial should take place.

The evidence being closed, and the counsel having been fully

* The same thing was done by Lord Chief Justice Treby, on the trial of Peter Cook, for high treason in 1696, 4 St. Trials, 749.

heard on both sides, Yeates, J. delivered the charge to the jury, substantially as follows :

We possess no political characters on this bench. We are bound by every tie of religion and duty to see that the laws of the country shall be the rule of conduct, and that justice shall flow in her usual and accustomed channels, without respect to persons.

The defendant stands indicted, as a factious and seditious person, of a wicked mind, and unquiet and turbulent disposition and conversation, seditiously, maliciously and willfully intending, as much as in him lay, to bring into contempt and hatred, the independence of the United State, the constitution of this commonwealth and of the United States, to excite popular discontent and dissatisfaction against the scheme of polity instituted and upon trial in the said United States, and in the said commonwealth, to molest, disturb and destroy the peace and public tranquility of the said United States, and of the said commonwealth, to condemn the principles of the revolution, and revile, depreciate and scandalize the characters of the revolutionary patriots and statesmen, to endanger, subvert and totally destroy the republican constitutions and free governments of the said United States, and this commonwealth, to involve the said United States, and this commonwealth in civil war, desolation and anarchy, and to procure by art and force, a radical change and alteration in the principles and forms of the said constitutions and governments, without the free will, wish and concurrence of the people of the said United States, and this commonwealth respectively, and to fulfill, perfect and bring to effect his wicked, seditious and detestable intentions aforesaid, he the said Joseph Dennie, on the 23d of April 1803, at the city of Philadelphia, falsely, maliciously, factiously and seditiously did make, compose, write and publish the following libel, to wit : “ A democracy is scarcely tolerable at any period of national history. Its omens are always sinister, and its powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on its trial here; and its issue will be civil war, desolation and anarchy. No wise man but discerns its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious is a memorable example of what the villainy of some men can devise, the

folly of others receive, and both establish in despite of reason, reflection, and sensation. ”

This publication is stated to have been made in a certain weekly paper called the Port Folio ; and the act is charged in the indictment to have been committed “in manifest contempt of the constitution and laws of the said United States and this commonwealth, in derogation of the national independence, reputation, and honor, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth of Pennsylvania. ”

Is the defendant guilty or not of the facts and intentions charged, is the question to be tried. The case is admitted to be of high moment.

The 7th section of the 9th article of the constitution of the state, must be our guide upon this occasion, it forms the solemn compact between the people and the three branches of the government, the legislative, executive and judicial powers. Neither of them can exceed the limits prescribed to them respectively. To this exposition of the public will, every branch of the common law, and of our municipal acts of assembly must conform ; and if incompatible therewith, they must yield and give way. Judicial decisions cannot weigh against it when repugnant thereto. It runs thus :

“ The printing presses shall be free to every person, who undertakes to examine the proceedings of the legislature, or any branch of government ; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man ; and every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence : and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases. ”

Thus it is evident, that legislative acts or of any branch of the government, are open to public discussion ; and every citizen may freely speak, write or print on any subject, but is accountable for the abuse of that privilege. There shall be no licenses of the press. Publish as you please in the first instance without control ; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to private men, affected by injurious publications, unless the discussion be proper for public information. But “ if one uses the weapon of truth

wantonly, for disturbing the peace of families, he is guilty of a libel." Per general Hamilton in Crosswell's trial, pa. 70. The matter published is not proper for public information. The common weal is not interested in such a communication except to suppress it.

What is the meaning of the words "being responsible for the abuse of that liberty," if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection that the determinations of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them, when party spirit runs high, in other criminal prosecutions. But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method prescribed.

It is no infraction of the law to publish temperate investigations of the nature and forms of government. The day is long past, since Algernon Sidney's celebrated treatise on government cited on this trial, was considered as a treasonable libel. The enlightened advocates of representative republican government pride themselves in the reflection, that the more deeply their system is examined, the more fully will the judgments of honest men be satisfied, that it is the most conducive to the safety and happiness of a free people. "Such matters are proper for public information." But there is a marked and evident distinction between such publications, and those which are plainly accompanied with a criminal intent, deliberately designed to loosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities. These latter writings are subversive of all government and good order. "The liberty of the press consists in publishing the truth, from good motives and for justifiable ends, though it reflects on government or on magistrates." Per general Hamilton in Crosswell's trial, pa. 63, 64. It disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual. But the malicious publications which I have reprobated, infect insidiously the public mind with a subtle poison, and produce the most mischievous and alarming consequences, by their tendency to anarchy, sedition, and civil war. We cannot, consistently with our official duty, pronounce such conduct punishable. We believe that it is not justified by the words or meaning of our constitution. It is true, it may not be easy in every instance, to draw the exact distinguishing line. To the jury, it

peculiarly belongs to decide on the intent and object of the writing.

It is their duty to judge candidly and fairly, leaning to the favorable side, where the criminal intent is not clearly and evidently ascertained.

It remains therefore under our most careful consideration of the 9th article of the constitution, for the jury to divest themselves of all political prejudices (if any such they have) and dispassionately to examine the publication in the Port Folio, which is the ground of the present prosecution. They must decide on their oaths, as they will answer to God and their country, whether the defendant, as a factious and seditious person, with the criminal intentions imputed to him, in order to accomplish the objects stated in the indictment, did make and publish the writing in question. Should they find the charges laid against him in the indictment to be well founded, they are bound to find him guilty. They must judge for themselves on the plain import of the words, without any forced or strained construction of the meaning of the author or editor, and determine on the correctness of the innuendos. To every word they will assign its natural sense, but will collect the true intention from the context, the whole piece. They will accurately weigh the probabilities of the charge against a literary man. Consequences they will wholly disregard, but firmly discharge their duty. Representative republican governments stand on immovable bases, which cannot be shaken by theoretical systems. Yet if the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and willfully aimed at the independence of the United States, the constitution thereof, or of this state, they should convict the defendant. If on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously, or that the censures on democracy were bestowed on pure unmixed democracy, where the people *en masse* execute the sovereign power without the medium of their representatives (agreeably to our forms of government) as have occurred at different times in Athens, Sparta, Rome, France, and England; then however the judgments of the jury may incline them to think individually, they should acquit the defendant. In the first instance, the act would be criminal; in the last, it would be innocent. If the jury should doubt of the criminal intention, then also the law pronounces, that he should be acquitted. 4 Burr. 2552. per Ld. Mansfield.

Thus have we endeavored to discharge our official duty to the jury, with impartiality. It rests with them to discharge their duties, virtuously and conscientiously agreeably to the true spirit of our constitution and laws.

Verdict not guilty.

DECEMBER TERM 1805.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

Lessee of the Mayor, Aldermen and Citizens of Philadelphia, *against*
THOMAS CLIFFORD and JOHN CLIFFORD.

Qu. whether a patent granted to the mayor, &c. of Philadelphia in trust for the interment of strangers, be valid under the act of assembly of 8th April 1786? Where one is in possession of lands at the time of an ejectment served, and appears and pleads generally, he cannot upon trial narrow his defence to part of the lands in his possession, but the jury will give a verdict as to the whole.

EJECTMENT for a large lot of ground 816 feet in length on Schuylkill Front street, and 396 feet in breadth on Vine street.

The plaintiff claimed the premises under a patent to the lessors, from the Supreme Executive Council, dated 13th December 1790, for the interment of deceased strangers, and such other persons who may not have been in communion with any religious society at the time of their decease, agreeably to the act of assembly passed on the 8th April 1786.

Mr. Rawle for the defendants contended, that the plaintiff must become nonsuit, having shown no title. The act of 27th November 1779, 1 St. Laws 822, vested the estate of the late proprietaries in this commonwealth. By another act passed on the 10th April 1781, the Supreme Executive Council was empowered to sell such and so many of the vacant city lots, as would be sufficient to redeem such part of the bills of credit emitted by a former law of the 28th of March 1780, as should not be redeemed by the proceeds of the sale of Province island, 1 St. Laws 896. sect. 2; and by the 3d sect. the purchases under the deed or grant from the president or vice president in council, became seized of a sure and indefeasible estate in fee simple. No power is given by any clause in the act of 1781 to the executive, to make deeds or grants to any persons except *bona fide* purchasers. Another law passed on the 8th April 1786, 2 St. Laws 452, on which the present patent is supposed to be founded; by which it is directed that such of the city lots, as had reverted to or remained the property of the state, (excepting eight of the same lots particularly specified) should be sold by the Supreme Executive Council. Then follows the proviso, which authorises and requires the council to reserve so many of the public lots, as shall be at least 200 feet, and not more than 400 feet square, to be appro-

priated as a burial ground for the interment of strangers and others, &c. The 3d section provides that the titles shall be made according to the tenor and terms of the act of 10th April 1781, and by the 6th section, the proceeds of the sales of the lots are to be paid to the receiver general.

The powers in the Supreme Executive Counsel to grant a patent must necessarily depend on some legislative act, which in the laws of 1781 and 1786, are confined to purchasers. Under the present deed, it is impossible that any legal interest can vest in the lessors of the plaintiff.

The court stopped the counsel on the part of the plaintiff, and said they would reserve the point for further discussion, in case the same became necessary.* The trial then proceeded.

The defendants claimed under Francis Smith, an original purchaser of 5000 acres, under deeds of lease and release from William Penn, dated 10th September 1681, by which he became intitled to two city lots, and 100 acres of liberty land. The difficulty lay in establishing the pedigree and descents under the first purchaser. The High street lot was laid out on the 16th October 1771, and returned on the 18th November following containing 132 feet by 306 feet.

Thomas Clifford obtained a survey of part of the lot in dispute, containing 204 feet in front, by the city regulators in the fall of 1787, inclosed it by a fence, and claimed the whole lot under Smith. The defendants were in possession of this portion of the ground, when the ejectment was brought; but upon the trial claimed only the middle lot, containing 102 feet front, by 396 feet deep, designated in the map of Thomas Holme (the first surveyor general of the late province, who died in 1701,) No 42, the other parcel, being marked No. 43.

A general appearance had been entered to the ejectment: and a question was made, how their verdict should be taken, in case the jury should establish the possession of the defendants in lot No. 42.

† Yeates and Brackenridge, Justices, were of opinion, that as the defendants were in possession of both portions of the ground, containing 204 feet in front, when the ejectment was served, and had appeared generally thereto, and confessed lease, entry and ouster, in pursuance of the common rule, they could not now narrow their defence to part of their possession; and that the plaintiff was upon the trial, entitled

* Judgment was afterwards entered *pro quer.*

† *Absente*, Shippen, O. J.

to a verdict for such part of the ground as he could show title to, and could prove to be in the occupation of the defendants at the time of the commencement of the suit. Vid. 1 Lord Ray. 729. Bull. 98, 110. Law of Ejectments.

Smith, J. thought the verdict ought to be taken for the defendants on lot No. 42; and as to the northern lot, No. 43, the plaintiff should be called and nonsuited, on account of the defendants not confessing lease, entry and ouster, pursuant to the common rule; and thereupon judgment would be entered for the plaintiff against the casual ejector for lot No. 43. This is a question as to mere form, because the verdict taken in either way, will effect no difference, either as to costs or *mesne* profits. 2 Burr. 668.

The jury found a verdict for the defendants, as to lot No. 42; and for the plaintiff as to lot No. 43, as designated in the old map of Holme.

Messrs. E. Tilghman, Hopkinson and Dickerson, *pro quer.*

JACOB DOWNING *against* ROBERT PHILIPS.

Foreign attachment set aside, a judgment having been obtained for the demand in a sister state, and an execution levied thereupon.

ON a rule to show cause why the foreign attachment issued in this suit should not be set aside, the positive affidavit of the plaintiff was shown, that the defendant was justly indebted to him in 2711 dollars and 13 cents; and that his place of residence was in the county of Newcastle in the State of Delaware.

The defendant produced the record of a judgment entered against him, in Newcastle county, by the plaintiff, on the 19th February 1805, for the same demand; and a *fieri facias* issued thereon returnable to October term 1805, on which the defendant's goods and lands were levied. On the 25th of the same month a bill was preferred to the chancellor for an injunction, who granted the same, and security was given by the defendant in pursuance of his orders. Upon service of the injunction, the plaintiff's counsel countermanded the execution.

On this statement of facts, the plaintiff's counsel insisted, that no equity appeared in the bill exhibited to the chancellor. But the court said it was impossible to support the attachment under the circumstances of this case.

If sufficient equity was not disclosed in the bill to warrant the

chancellor's interposition, this court is bound to presume, that he will dissolve the injunction. The plaintiff has chosen his own forum, in the first instance. He has obtained judgment, and levied his execution, which is a satisfaction in law. He has also ample security under the order for an injunction. To entertain this suit, would be a race for jurisdiction, highly unbecoming the relative character of the individual states of the union towards each other.

Attachment quashed.

Mr. John Read, *pro quer.*

Messrs. Ingersoll and Rodney, *pro def.*

JOSEPH DONATH and JAMES J. MAZURIE *against* the President and Directors of the Insurance Company of North America.

The notarial copy of an agreement made in Philadelphia, respecting the loading of a vessel insured, the original being admitted to be in the hands of an agent abroad, not permitted as evidence against the underwriters.

COVENANT on a policy of insurance, on goods at and from Philadelphia to Havanna, and back again; the property insured on the outward passage being warranted to belong to Don Alvarez Calderon, king's attorney in the island of Cuba.

A notarial copy of an agreement between the plaintiffs and the said Don Alvarez Calderon, respecting the goods laden, was offered in evidence by the plaintiffs. It was registered in Philadelphia, in the office of Clement Biddle, notary public, and the copy certified by him. It was admitted, that the original had been sent by the plaintiffs to the Havanna, where it continued in the hands of their agent.

The defendants counsel excepted to the instrument being received in evidence. The paper offered is the copy of a copy of the original in the custody and power of the plaintiffs. The possession of the agent must be considered as the possession of the principal. The primary rule of evidence is, that the party should produce the best testimony in his power. In *Parish v. Travis*, the notice to an indorser of a note of its being dishonored, was attempted to be shown by a protest, but was refused on argument.

The present case is not within the words of the 5th section of the act of 5th March 1791. 1 St. Laws, 12.

The certified copies of the notary's record are intended plainly as evidence in foreign courts. The law is silent as to such copies being received in our own tribunals. Where the legislature have intended to

make copies evidence, they have so declared it in express terms. Thus in the act concerning the probates of wills, passed in 1705, it is enacted, that the copies of all wills and probates, under the public seals, shall be good evidence to prove the gift or devise thereby made. 1 St. Laws, 54, § 1.

So in the recording act of 1715, the copies or exemplifications of all deeds enrolled, shall be allowed in all courts, where produced. *Ib.* 111, § 5.

So in the auction act of 1780, the auctioneer, is directed to keep a register of horses sold, and the copy thereof shall be read in evidence. *Ib.* 866, § 6.

So in the act passed on the 12th March 1791, enjoining certain duties on the secretary of the commonwealth ; the copies of bonds and recognizances given by public officers certified under the hand and seal of the said secretary, or of the recorder of deeds of the proper county, are declared to be legal evidence. 3 St Laws, 14 § 1. This act was passed seven days after the law enabling the governor to appoint notaries public. Many other instances of the same kind of legislative provision might be produced, if necessary. It cannot escape the observation of the court, that the defendants were neither parties nor privies to this agreement ; and that a copy at second hand is now attempted to be read, where it is admitted, that so far from the original being lost or destroyed it now is in the hands or power of the party offering the evidence.

The plaintiffs' counsel contended, that the rules of evidence in commercial matters, were not quite the same, as in other instances. The testimony of a public notary is evidence, by the laws of France. Contracts are made in his presence, and his testimony would be received in England. 1 Atky. 47. Great force is given to notorial acts. 6 Vez. jr. 823. The copy of a French bill of sale of a ship, by a notorial act under seal, has been ruled to be good evidence to prove a transfer of the vessel. 3 Espin. Rep. 287-8. All these are cases independent of legislative provision.

When we consider the policy of the act of the 5th March 1791, and the different clauses of that law, the intention of the legislature cannot be mistaken. The notaries public are to be of known good character integrity and abilities, § 2. They are empowered to administer oaths in all matters incident to the exercise of their offices, § 3. To receive the proof or acknowledgment of all instruments of writing relating to commerce or navigation, and also to make declarations and testify the truth thereof, under their seals of office, § 4. And to keep fair registers of all official acts by them done in virtue of their offices, and

give certified copies of any records, § 5. Why should not the copy of an agreement respecting the loading of a ship, be equally received in evidence, when properly certified by the notary, as hypothecations, charter parties, letters of attorney, and other writings of a commercial nature, enumerated in the fourth section of the law? They stand on the same ground, and cannot be distinguished on principle.

Every exemplification of a record is but the copy of a copy; and being made evidence, it operates as such in all given cases.

Yeates, J.* delivered the opinion of himself and Smith, J. The cases cited by the plaintiffs respect commercial transactions in foreign countries, in which the *lex loci* is of great weight. In 3 Espin. Rep. 289, Lord Eldon admitted the copy, "the original being always retained, and a copy only issued by a person, having power by the law of France to authenticate the instrument."

But whatever our opinions may be, we do not deem it necessary in the present instance to lay down any general rule with respect to notarial copies.

It is admitted here, that the original agreement is in existence in the possession of the plaintiffs' agent, and consequently under their control. The defendants are neither parties nor privies thereto, and it would be highly dangerous to affect the rights of strangers, by such a copy, where the legislature have been silent on the subject.

Brackenridge, J. I am clear, that the paper offered is good evidence as between the contracting parties; and as to others, I also think it is evidence. I see no difference between this copy and exemplifications by registers of wills and recorders of deeds.

Yeates, J. Two of us conceive, that the distinction rests on the phraseology of the different laws constituting the several offices.

Evidence overruled.

After the cause had progressed some length, it was agreed to discharge the jury, and state a case for the opinion of the court thereon.

Messrs. M. Levy and Dallas, *pro quer.*

Messrs. Ingersoll and Hopkinson, *pro def.*

* *Abbate*, Chief Justice.

MARCH TERM 1806.

FOR THE EASTERN DISTRICT.

CORAM—TILGHMAN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

MEMORANDUM.

Immediately after the rising of the court, in December term 1805, the honorable Edward Shippen, esquire, resigned his office as Chief Justice of the Supreme Court; which was accepted by the governor on the last day of the same month.

On the 25th February 1806, the honorable William Tilghman, esquire, was commissioned as Chief Justice, *quandiu se bene gesserit*. His commission was published in open court on the first day of the next term, 8d March 1806.

WILLIAM GEISS and EVE his wife *against* GEORGE U. ODENHEIMER.

The real time of execution of a deed may be shown by parol testimony. When a deed is antedated the burden of proof of the time of its execution lies on the party claiming under it.

Scire facias sur mortgage dated 17th December 1801, by Peter P. Walter to the plaintiffs, to secure the payment of 800 dollars with interest on the 17th June 1802, acknowledged 18th December 1801, and recorded on the next day.

Walter conveyed the premises to Odenheimer by deed dated 20th July 1801 (but which was admitted to be antedated) acknowledged 18th December 1801, and recorded 27th April 1802; and Odenheimer was substituted as the defendant, under the plea, of payment, with leave to give the special matter in evidence. The only question was, whether the mortgage or deed was first executed.

Mr. Rawle for the defendant, called the subscribing witnesses to the deed, to prove the time of its execution; but this was opposed by Mr. M. Levy for the plaintiffs.

Every deed is intended to be delivered on the day it bears date. 2 Inst. 674. Antedating a deed is a strong presumption of fraud. Under the general words of the 8th section of the recording act of 1715, no deeds shall convey any freehold or inheritance, or grant any estate for life or years, unless the same be recorded in the proper county within six months after the date thereof. 1 St. Laws 112. Reckoning the months to be calendar months, this deed was not recorded till seven days after

the time allowed. Under the supplement to the recording act passed in 1775, the subsequent mortgage being first recorded shall prevail against it. 1 St. Laws 703. If the mortgagee had assigned it, a purchaser thereof would have no doubts of its sufficiency on examining the records. The date is an operative part of the deed, and it is the policy of the acts instituting the recorder's office, that persons using due diligence should be protected in their titles. It would be highly inconvenient, that a time of execution of a deed varying from the apparent date should be established by parol testimony.

The court stopped the defendant's counsel from proceeding, as they had no difficulty on the point.

And per Tilghman, C. J. The very authority in 2 Inst. 674, shows that the real time of delivery of a deed may be shown in evidence. The date shall be intended the time of delivery unless the contrary is proved; the presumption stands until it is removed by testimony. It would be of the most dangerous consequence, to assert that the dates of deeds are conclusive; the greatest frauds might thus be committed. If the true time of execution may be proved by one party, so may it by the other. The 8th section of the recording act of 1715 has been always confined to mortgages and defeasible deeds; a different construction would overthrow many titles. The supplement thereto has varied the expressions, but furnishes a strong legislative exposition of the former act. The deeds and conveyances are to be recorded within six months after their execution. We have no doubt but the evidence is strictly legal, and must be received.

Yeates, J. It has been determined in this court on solemn argument, in *Burk v. Allen*, that the 8th section of the act of 1715 does not extend to deeds in general.

The witnesses were examined, but could not establish the time of execution of the deed.

On the contrary, it appeared by the deposition of Walter, that the mortgage was first executed, and his testimony was corroborated by several circumstances.

After the counsel had addressed the jury, the chief justice submitted to them, that if they believed the testimony of Walter, the plaintiff must prevail. But if they should doubt his credibility, and believe that the deed was executed on the 17th December, the day of its acknowledgment, still it was incumbent on the grantee to establish its execution prior to that of the mortgage. The deed being confessedly

antedated, the burden of proof was thrown on the defendant.

Verdict for the plaintiffs for 1002 dollars debt.

Lessee of SAMUEL CHURCH *against* JOHN CHURCH.

The declarations of a grantee, after the execution of the deed, that he had paid nothing for it, not admissible in evidence. Such deed is good against the party, tho' void against creditors.

EJECTMENT for a messuage and lot of ground in the district of Southwark. The plaintiff claimed under a deed from Shepherd Church, to his mother Mary Church (who was likewise the mother of the parties) for this lot and other lots in the city, in consideration of 800l., which was duly acknowledged and recorded. She, by will, dated 24th June 1790, devised the premises to her son Shepherd, and in case he died without legal heirs of his body, then over to her son Samuel, the lessor of the plaintiff in fee. Shepherd died unmarried three years before his mother.

On the part of the defendant it was contended, that Mary Church was wholly unable to make this purchase, and had not paid the consideration money. That the sale was merely fictitious, and the conveyance was made to guard the property against creditors, in consequence of an improvident connection in trade formed with one Jeffries at Baltimore.

In the first instance, the declarations of the said Mary Church, made shortly after the deed, that she had not paid any part of the 800l., but held it in trust for the family, were offered in evidence. This was objected to.

Mr. M. Levy for the defendant. The declarations of the parties, at and immediately before the execution of a deed, have always been received in evidence in this state; and the declarations of a grantor afterwards was admitted in 1 Dall. 193. The case is much stronger as to those of the grantee, who took the estate. The noted case of *Harvey v. Harvey*, 2 Cha. Ca. 180, led the way in matters of this nature.

Messrs. Ingersoll and Tod for the plaintiff. The testimony offered is in direct opposition to the "act for prevention of frauds and perjuries," passed 21st March 1772. 1 St. Laws 640. It tends to annul the operation of a solemn conveyance, by loose conversations, frequently misunderstood and often misrepresented. The public policy of the country is thereby counteracted, and a flood of perjury introduced. This is not an estate created by operation of law, as attempted to be proved. For though no money was paid, the conveyance may operate

as a voluntary deed, unless in the case of creditors, where the deed might be deemed fraudulent. Nothing is a resulting trust under the statute of frauds and perjuries, but what are there called trusts by operation of law; and they are confined to two cases: 1st. When an estate is purchased in the name of one person, but the money or consideration is given by another. 2d. Where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law, and they cannot be said to be trustees for the residue. 2 Atky. 150. The case cited from Dall. 193, was clearly a resulting trust of the first kind; and the case of Harvey v. Harvey was *in genere*. Declarations of a party to a deed previous to the execution, have been admitted in support of the deed against imputations of fraud; but declarations subsequent, impeaching the deed, have been rejected. 5 Ves. jr. 701. Parol evidence has been held not admissible, to prove from conversations before and at the time of signing an agreement for a lease, what were the intentions of the parties. 4 Bro. Cha. Ca. 514. So, to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease. 2 W. Bla. 1249. Lord Chancellor Parker has said, words can have no weight against a deed solemnly executed. 1 Wms. 482.

It is true, the courts in this state have gone much further in receiving parol testimony, of what passed at and immediately before the execution of a deed, than would be admitted in the courts of law or equity in England; particularly in *Hurst's lessee v. Kirkbridge and Riche*, at a Court of *Nisi Prius* in Bucks county, which has been often recognized; but they have never gone to the extent now contended for.

Tilghman, C. J. I fully agree with Mr. Justice Bradford in his observation on that case, and that it varied from the law in England. 2 Dall. 172.

The court unanimously think this evidence cannot be received; it directly militates against the act of frauds and perjuries. The greatest dangers would ensue. Here there is no resulting trust. The deed, would enure as a voluntary deed unless creditors were thereby defrauded. Neither on principle nor precedent can the testimony be admitted.

The jury gave a verdict for the plaintiff without leaving the bar.

*There parol evidence was admitted, to show that it was not the intent of major Fell to include Pennsbury manor in a deed for all his lands in Pennsylvania, from what passed before and at the time of executing the articles of agreement.

JAMES TRAQUAIR *against* JOHN REDINGER.

JOHN REDINGER *against* JAMES TRAQUAIR.

Report of referees finding that the plaintiff shall pay the costs of suit is equivalent to finding no cause of action.

On the trial of a special action on the case brought by Traquair against Redinger, for depriving him of the use of water for his mill, which was occupied in sawing of marble, (during this term) the court, after having spent nearly two days in the trial, recommended a special reference, in order to save the parties from further disputes, and permanently to settle their respective privileges as to their future use of the water.

It was at length agreed to submit the matter to the decision of the twelve jurors or any nine of them, under a rule of reference, particularly designating their authority. A second action between the same parties, and a cross suit by Redinger v. Traquair, were also included in the reference.

The referees went upon the ground in pursuance of the agreement of the parties, and after having viewed the premises, and heard the further proofs, made a special report strictly within the terms of the submission, wherein they awarded to Traquair 1000 dollars damages for his loss of the water; that he should pay the costs of his own action, and Redinger should pay the costs of his action; and that Redinger should draw off the water from the dam, during the periods wherein he was entitled to use the same, by fixing nine trunks of the dimensions of three by four inches in the clear, to be laid six inches from the bottom of the dam, &c. &c.

To this report three exceptions were taken—That,

1st. The referees had not decided in Redinger's suit.

2d. The report was unintelligible.

3d. The referees had violated a solemn contract.

After full argument, the chief justice declared the unanimous opinion of the court, that an award finding that the plaintiff should pay the costs of the suit, without adding more, was equivalent to finding no cause of action, and had heretofore been so determined; that the referees had conformed themselves to the authority delegated to them, had violated no contract between the parties; and that the report being perfectly intelligible, was approved of and confirmed by the court.

Messrs. M. and S. Levy of counsel with Traquair.

Messrs. Condry and Hopkinson of counsel with Redinger.

ALEXANDER KERR *against* JONATHAN MEREDITH.

Under stat. 8 and 9 Wil. 3, c. 11, in debt on the penalty of a bond, plaintiff may assign as many breaches as he please. If his pleading is vicious, defendant must take advantage of it by demurrer.

DEBT 250,000 dollars, on bond, dated 1st April 1797, with special condition.

The defendant demurred to the declaration, which was overruled on argument in March term last. [Where the obligation, condition, article of agreement referred to therein, assignments and pleadings are fully stated.] He also pleaded by leave of the court, covenants performed.

The plaintiff joined in demurrer ; and further replied, that the obligors have not performed the covenants in the condition of the said bond mentioned, in this ; that they have not indemnified the said Kerr, from all costs, suits losses and damages, on account of the debts and engagements due by the late co-partnership of Kerr and Hawthorne, inasmuch as he, the said Kerr, was arrested by Samuel Gregg, Samuel Lyle and Peter Ewart, for a company debt since the execution of the said bond, and thereby put to great costs and charges to the amount of \$100, and was imprisoned for six hours ; and this he is ready to verify. In this also, that the obligors have not paid the company debts of Kerr and Hawthorne, which were due on the 1st April 1797, to wit, to John Phillips, \$12,087 57 cents ; to Charles Wood and Co. \$815 42 cents ; to Phillip Oates and Co. \$7311 2 cents ; to Samuel Phillips and Co. \$3250 74 cents ; to Moore, Stanger and Co. \$1789 39 cents ; to William Dubbs, 1100*l.* 10*s.* sterling ; to Samuel Gregg and Co. \$2284 95 cents ; to Cookson and Waddington, \$1519 18 cents ; to Bowerbank, Monkhouse and Co. 476*l.* 2*s.* 5*d.* sterling ; to Francis Nalder, 93*l.* 7*s.* 8*d.* sterling ; to Drury and Gilbert, \$726 61 cents, to John Davenport, \$1195 77 cents ; to Samuel and William Hibbert, \$2287 75 cents ; to Scott, Crosky and Stokes, 414*l.* 10*s.* 10*d.* sterling ; to Thomas and George Maltby, 2419*l.* 13*s.* 8*d.* sterling ; to Smith and Thomson, 385*l.* 19*s.* 9*d.* sterling ; to Wilts and Rowley, 382*l.* 8*s.* 4*d.* sterling ; and also to the same firm, 390*l.* 18*s.* 10*d.* sterling ; and to Redesdale and Co. \$1924 83 cents, all which debts remain unpaid, and of which the said obligors had notice ; and this he is ready to verify. And in this also, that the obligors have not paid to the said Alexander Kerr, the sum of \$9000, for his share of the partnership ; and this he is also ready to verify.

The defendants rejoined, that they had at all times indemnified the plaintiff from all costs, suits, losses and damages, on account of the debts and engagements due by the late co-partnership of Kerr and

Hawthorne ; without this, that the said Kerr, was arrested by the said Samuel Gregg, Samuel Lyle and Peter Ewart, for the partnership debt ; and of this they put themselves on the country. And further, that all the company debts of Kerr and Hawthorne, due on the 1st April 1797, to wit, to Charles Wood and Co. &c. (enumerating them particularly as mentioned in the replication,) have been paid by the said Thomas Hawthorne, since the said 1st April. 1797, (except the debts alleged to be due to John Phillips and co. and Wilts and Rowley, to whom in fact no debts were due,) and of this they put themselves on the country. And further, that the said \$9000, have been paid to the said Alexander Kerr, for his share of the partnership, before the commencement of this suit ; and of this also, they put themselves on the country. *Querens, similiter, &c.*

A plea in abatement, that a former suit was depending for the same cause of action, having been withdrawn, under the recommendation of the court, the following agreement was entered on the docket on March 12, 1804. "It is ordered, that this action shall stand for the use of Anne Lang and William Hawthorne, and for the use of James Lyle and James Taylor, the assignees in trust for the creditors of Kerr and Hawthorne generally, and for the use of all and every person and persons entitled to any benefit or indemnity, under the bond on which this suit is brought, and in the order in which such person or persons are so entitled. But under this order, each claimant shall establish his quantum of debt or damages, by legal process and adjudication. Provided, that this be taken as no recognition by the defendants, that the plaintiff in this suit ought to recover for any purpose whatsoever. All other actions brought on the same bond, are agreed to be discontinued."

The cause came on to trial at Nisi Prius, on the 26th August 1805, before Yeates, Smith and Brackenridge, justices when after a full hearing of five days, the jury gave the following verdict, which was formally drawn up at the bar by the plaintiff's counsel, the defendant's counsel refusing any concurrence therein.

The jury find for the plaintiff by virtue of the bond aforesaid, \$250,000 being the penalty thereof, with 6 cents damages, and 6 cents costs. And the jury say, that the said sum in part arises, because the defendant hath not indemnified the plaintiff from all costs, suits, losses and damages, on account of the debts and engagements due by the late co-partnership of Kerr and Hawthorne, in this, that the plaintiff hath suffered loss by a suit and arrest, in the names of Gregg, Lyle and Ewart, to the amount of 10 cents. which the jury assess to be due to him, by reason of such loss and damage ; and also in this, that there were before the 1st April 1797, company debts due from Kerr and Hawthorne, and are now due, amounting with interest as follows: [Hereundry debts are specified, part of those mentioned in the replication,

among which are the debts due to Drury and Gilbert, Scott, Croskey and Stokes, Samuel and William Hibbert, and John Davenport, not found separately, but all included in one aggregate sum of \$1844 and 25 cents.]

As to the debt of Gregg, Lyle and Ewart, the jury find for the defendant: as to the debts of Francis Nalder, and of Moore, Stanger, and Co., they find for the defendant, subject to the opinion of the court on the matters of law: and as to the breach assigned in non-payment of the \$9000, to Kerr, they also find for the defendant: and they further find, that the rest of the said sum of \$250,000 the penalty of the said bond, remains for the use of Anne Lang, and William Hawthorne; and for the use of James Lyle and James Taylor, the assignees in trust for the creditors of Kerr and Hawthorne generally, and for the use of all and every person and persons entitled to any further benefit or indemnity under the said bond, on which this suit is brought, and in the order in which such persons are so entitled; each of such persons first establishing the quantum of debts or damages, by legal process and adjudication.

Upon the return of the *postea*, the defendant's counsel obtained a rule to show cause, why a new trial should not be granted; and also filed the following reasons in arrest of judgment, on the 5th September 1805:

1st. For that it appears by the plaintiff's replication, that the debt claimed by Drury and Gilbert from the defendant, the debt claimed from the defendant by Scott, Croskey and Stokes, that claimed from him by Samuel and William Hibbert, and the debt claimed from him by John Davenport, were four separate and distinct debts or demands, which by the pleadings were distinctly and separately put in issue; and upon which, the jury ought distinctly and separately to have found their verdict: whereas by the verdict one entire sum is found due to the said four claimants or supposed creditors.

2d. For that various breaches of the articles of agreement and condition of the bond referred to in the pleadings are assigned; among other things in the non-payment of divers sums of money to different supposed creditors of Hawthorne and Kerr, amounting in number to fourteen different individuals or commercial houses at the least, by means whereof the defendant hath been driven to the necessity of either admitting the facts as stated in the pleadings, or contraverting upon the same trial before the same jury, fourteen distinct and separate claims or debts, of as many different individuals or commercial houses: that this mode of pleading is contrary to the spirit and principles of the common law, and that no judgment can be rendered thereon.

3d. That upon these pleadings, no judgment ought to be rendered,

whereby the defendant shall be obliged to pay to any of the supposed creditors in the replication mentioned, the particular sum or sums alleged to be due to them.

4th. That by the agreement of 12th March 1804, filed in this cause, no judgment can lawfully be entered thereon, whereby the defendant shall be obliged to pay to any of the supposed creditors in the replication mentioned, the particular sum or sums found to be due to them.

5th. That the obligation and agreement stated in the pleadings, form a ground of action or relief only to Alexander Kerr, and not to the assignees of the said bond, either for their own benefit, or that of the creditors of Hawthorne and Kerr.

6th. For that the damages found to have been sustained by the different persons in the replication mentioned, to whom the jury have awarded any sum or sums of money in this cause, exceed in the whole the sum of forty thousand dollars, whereas the damages laid in the declaration are a far less sum ; to wit, the sum of ten thousand dollars only.

The argument on the rule to show cause, came on at the last December term ; and the court discharged the rule. They were not dissatisfied with the general result of the verdict. How far it might operate, or what might be its legal extent, would be the subject of future discussion. The clear object of the bond and articles was a full indemnification to Kerr against the partnership debts ; and while in any shape, he could be made responsible for any of them to the creditors, he was entitled to recur to the defendant under all the circumstances of the case.

The reasons in arrest of judgment were argued this term ; but the sixth exception was abandoned as indefensible.

The arguments for the defendant was substantially as follow.

Exception 1st. The jury are bound to find the whole issue ; but they have consolidated four distinct debts submitted to them into one mass, making a sum total of \$1844 and 25 cents. The verdict must not only be substantially good in itself, but it must be good with reference to all the pleadings. Here the verdict does not pursue the replication and rejoinder. There was no consolidated debt due to four different firms put in issue ; nor was it ever pretended that such joint debt existed. Under the statute of 8 and 9 Wil. 3, on *nil debet*, the jury must assess the damages upon each breach. 2 Wils. 377.

The court have it not in their power to mould this verdict into form, in the present particular. Neither their own notes, nor those of the clerk, will serve as a guide on the occasion. The jury must find the substantial facts, on which the court only can act. The defendant

did not interfere in the formation of the verdict; the notes returned by the jury when they came to the bar, must be taken with all their crossings and obliterations. From these memoranda, nothing can be collected.

Exception 2d. At common law, in debt upon a bond with condition to perform covenants, the plaintiff could assign only one breach; but in covenant, he might assign as many breaches as he pleased. Bull. 163. Cro. Cas. 176. This is altered by stat. 8 and 9 W. 3. c. 11. s. 8, and the plaintiffs may assign as many breaches as he shall think fit; and the jury shall assess damages for such of the said breaches, as the plaintiff shall prove to have been broken. This statute is compulsory on the plaintiff. 5 Term Rep. 541, 636. 1 Saund. 58. Williams's Note. In 2 Burr. 773, Mr. Caldecott states, that the statute does not extend to actions of debt brought for the penalty of a bond; it only relates to actions for damages for non-performance of covenants; and in such cases, enables the plaintiff to assign as many breaches as he shall think fit. Lord Mansfield agrees, that his principles are right. *Ib.* 774. Here the declaration does not pursue the statute; nor is it found by the jury, that the plaintiff has sustained damage by non-payment of the company debts; and therefore the verdict is not within the words or meaning of the statute. The assessing of damages is a legal term, and conveys a determinate idea. Juries are peculiarly the judges in cases of damages, they might consider that the contract was entered into by mistake or misapprehension; they have found damages to the plaintiff for the arrest, but not as to the non-payment of the company debts; and this is conceived to be an incurable defect.

Exception 3d. The statute of Wil. 3, was made for the benefit of the plaintiff on a breach of covenants, not of persons who are strangers to the record. The verdict is good only so far as it finds the 10 cents damages to the plaintiff for the arrest, at the suit of Gregg, Lyle and Ewart. Nothing can prevent the creditors from recovering their debts a second time, if this verdict should receive the sanction of the court.

Exception 4th. It cannot be believed, that the agreement of 12th March 1804, as entered on record, was intended to alter the rights of the parties, or precipitate the recovery by the creditors.

Each claimant is to establish the quantum of debt or damages by legal process and adjudication. The construction set up against us, is, that the creditors may establish their debts *en masse*; and varies the agreement, which necessarily refers to a separate process by each creditor, whose claim may be contested.

Exception 5th. The object of the bond and articles was the relief of Kerr himself, not of the creditors of the firm. He might

have delivered up to the obligors their bond without the concurrence of the partnership creditors ; he might have cancelled it himself. The obligation was intended to indemnify Kerr ; but merely being liable to a suit, is no damnification. The surety of an obligor is no creditor, until he has paid the debt. This is fully proved by *Smith et al. v. Gale*, 7 T. R. 364, and by *Hammond et al. v. Toulmin et al. Ibid.* 612. In this state, an assignee is subject to all the equity of his assignor. If the creditors had released their debts, the defendant would not have been liable.

The plaintiff's counsel arranged their arguments under three general heads. They considered, 1st whether if the pleadings were correct and the verdict good, the plaintiff was not entitled to recover ?

2dly. Are the allegations of the plaintiff sufficiently penned in point of legal form ?

3dly. Is the verdict substantially good, so as to authorize a judgment to be entered thereon ?

I. The articles of agreement contemplated three objects.

1st. That the debts of the partnership should be paid, at two stipulated periods. 2d. That Kerr should be fully indemnified therefrom. And 3rd. That he should receive \$9000, for his concern.

The bond was given accordingly ; the payment of the company debts was a substantive, independent covenant. Kerr has only received his \$9000. It is clear therefore, that the bond was designed to operate further than a complete indemnification. If on the 1st October 1798, the partnership debts were not paid, the plaintiff had a complete ground of action. A counter bond is forfeited by non-payment of the money at the day. 2 Bulst. 234. The principal case is much stronger. For if but a simple debt remained unpaid after the day fixed, the plaintiff had immediately a good cause of suit. He was under no necessity of paying the money in the first instance. Every word in the instrument must receive its full operation. At the same time it is admitted, that the assignees have no superior equity to the obligee, and that if the partnership creditors had released their debts, the substantial spirit of the contract would have been so far complied with.

The agreement of 12th March 1804, took place after the argument had begun on the plea in abatement. The first suit was brought for the use of Lang and Hawthorne, and a second suit for the use of Taylor and Lyle, under the agreement, both actions were consolidated for the use of all the creditors ; but each claimant was to establish his demand by legal process and adju-

dication. Separate suits are not contemplated hereby, but that the obligors should have an opportunity of contesting the claim of each creditor, under the bond. The agreement was made for the benefit of the creditors generally, with every degree of caution as to the interests of the obligors ; and nothing can defeat it, unless it impugns legal principles, which we contend to be in perfect unison therewith.

II. In almost all the instances in the books, declarations on bonds with special conditions take no notice of the conditions. They are usually declared upon as on bonds, conditioned to pay a sum of money at a certain day. If the defendant pleads generally a performance of the condition, the plaintiff in his replication must set out a breach or breaches, and tender issues thereon. In the assignment of the breaches, the stat. of 8 and 9 W. 3, c. 11, need not be mentioned ; and the more especially the breaches are stated, the fuller opportunity is given to the defendant of repelling the demand against him.

The assertion in 2 Burr. 772, of counsel, that in debt upon the penalty of a bond, the plaintiff ought to confine himself to one particular breach, is unfounded. It contradicts all the cases on the subject, and opposes the plain words of the statute. Ld. Mansfield states the express contrary in the same book, p. 824, and in the following page, that the judgment is to be for the whole penalty, and is to remain as a further security, though execution is to be stayed on payment of the sum due.

In 5. T. R. 538, 636, the declaration stated the breaches, but the jury found no damages. The judgment was entered for the penalty, and the error appeared on record. The defendant has rejoined to the plaintiff's replication, and thereby admits the propriety of the pleadings. He should not have taken the chance of a verdict, and afterwards insist on irregularities. He ought to have applied to the court by motion, or demurred to the replication. A verdict will cure the informality of an issue, but not where it is substantially defective. The multifarious matter disclosed in the replication, arose necessarily from the circumstances of the case. In Cowp. 578, Ld. Mansfield states it to be a rule in pleading, that you cannot go to issue on a general averment of performance.

The reason is, that the question may be brought to some degree of certainty, and notice given of what was to be agitated at the trial. A breach must be specifically assigned in debt on bond. *Aliter* in covenant. 1 Lord. Raym. 478. 1 Salk. 139.

If our mode of pleading has deviated from the simplicity of the common law, and is therefore vicious, its doubleness should have been excepted to by a special demurrer. 1 Rol. Rep. 112. In this mode

only are matters of form to be taken advantage of. 2 Wils. 11, 12. What may be good cause of demurrer, will not prevail in arrest of judgment. 3 Bl. Com. 394. A municipal law declares, that proceedings shall not be reversed for mere form. 8 St. Laws 97, sec. 17.

III. The verdict substantially finds damages. The grounds of the finding are stated; that the penalty arises in part from the defendant's not indemnifying the plaintiff from all costs, suits, losses, and damages, on account of the partnership debts, in this, that he has suffered loss by the arrest; and also in this, that the company debts have not been discharged. The findings will be connected together, and moulded into form by the court if necessary. This is not so strong as construing or to be and, and *vice versa*. If the jury had mentioned that they meant to assess the damages of the plaintiff, it would have been sufficient. What they have stated is at least tantamount thereto. The non-payment of the company debts was an inevitable loss to the plaintiff, who was responsible therefor. Though the verdict do not punctually find the words of the issue, yet if the point in issue may be concluded out of it, the court shall work it into form, and make it serve. Hob. 54. 2 Stra. 1036-7.

But it has been strongly urged, that four separate debts have been put in issue, and only one aggregate sum has been found. This arose from the jury's valuation of the lands on the Ridge road, which were conveyed by Hawthorne to John Allen, as agent for the four firms, no price being fixed. The jury valued the property at 2800 dollars, and proportioned it amongst the four sets of the creditors, but did not perfect the calculation. The notes of the court and memoranda of the jury will serve to ascertain the precise sums due to these four houses. 1 Salk. 53. A payment of the sum found due will fully exempt the defendant from these four debts; though it be less than the real sum due, it will be the loss of the creditors, but the gain of the defendant. The release of the trustees would be good, even after error brought.

If the jury had found all the fourteen debts in one joint sum, it would have been good, and would have been deducted from the penalty. It would be the duty of the trustees to separate and proportion the sums found; but a payment, according to the result of the verdict, would certainly free the obligors from all responsibility in future, as to the debts of those company creditors which were put in issue.

At the utmost, if all the debts except these four, have been properly found by the jury upon the breaches assigned, it will be no ground for arresting the judgment *in toto*, if the trustees will execute a release for these four debts under the

bond to the defendant. Every thing in the verdict will be presumed to be right unless the contrary appears. 1 Wils. 205.

The mode of entering up judgments under the stat. of 8 and 9 W. 3, c. 11, has been considered by Mr. Serjeant Williams, in his note to *Gainsford v. Griffith*. 1 Saund. 58. And Lord C. J. Alvanley, in delivering the opinion of the Court of Common Pleas, in a late case, has declared that he saw no objection thereto. 3 Bos. and Pul. 607. 612.

The court advised on the case for three days, and Tilghman, C. J. delivered their opinion as follows :

This is an action of debt for the penalty of a bond given by Thomas Hawthorne, John Maxwell Nesbitt, and the defendant Jonathan Meredith, to Alexander Kerr, the plaintiff. The action was originally commenced against all the obligors, but Mr. Nesbitt being dead, and Mr. Hawthorne having become a certificated bankrupt, Mr. Meredith remains at present the sole defendant.

In order to understand the case, it will be necessary to state the circumstances under which the bond was given, and also the pleadings, in the action.

He then stated 1st. The articles of agreement between Kerr and Hawthorne, dated 1st April 1797.

2dly. The bond and condition of of like date.

3dly. The assignment of the bond to Anne Lang and William Hawthorne, so far as was sufficient to discharge the debt from Kerr and Hawthorne to Lang and Hawthorne, (on which judgment had been obtained dated 7th March 1800.

4thly. A second assignment thereof to Taylor and Lyle, in trust for the creditors of Kerr and Hawthorne generally, of like date.

5thly. The plea of covenants performed.

6thly. The replication under the statute of 8 and 9 Wil. 3 c. 11, assigning three breaches.

7thly. The rejoinder, denying these three breaches, and tendering as to each a several issue, which was joined by the plaintiff.

And 8thly. The verdict.

The cause now comes before the court on a motion in arrest of judgment ; and in support of this motion, six exceptions have been taken to the proceedings.

I shall not examine these exceptions, in the manner they have been brought forward, either with respect to their order, or their number, because the 6th, was very properly given up by the defendant's counsel in the course of their argument ; and of those that remain, several may be considered under one point of view.

They are all reducible to three heads. 1st. The pleadings. 2d. The verdict. 3d. The manner of entering the judgment.

I. As to the pleadings, the plaintiff in his replication, has assigned three breaches. No objection has been made to the first, or to the third assignment: but it was urged, that the second was contrary to the spirit and principles of the common law; because it reduced the defendant to the hardship of taking issue upon a great number of separate debts, said to be due to divers persons from the house of Kerr and Hawthorne. But how was this to be avoided? It necessarily arose from the subject matter. The defendant had undertaken, that all the debts of Kerr and Hawthorne should be discharged by a certain day. The plaintiff claims damages for a breach of this undertaking. In order to entitle himself to damages, he must prove to the jury that the defendant had not performed his engagement. Suppose he had replied, that the defendant had not paid all the debts of Kerr and Hawthorne, and that upon this issue they had gone before the jury. How could the jury have formed any estimate of the damages, unless they received proof of the particular debts, that remained unpaid? And if this proof was necessary, was it not for the advantage of the defendant to receive notice in the replication of those particular debts, which the plaintiff averred to be outstanding.

Besides, under the statute of William, the plaintiff may assign as many breaches as he pleases. Now suppose he had assigned the non-payment of each particular debt as a separate breach; would not the defendant have been obliged to go into the trial of all of them, at one time? And might not he have justly complained, that the plaintiff by this mode of pleading, had wantonly swelled the record, and of course the expenses of the suit to an enormous magnitude? But if even this mode of pleading was vicious, which I think it was not, it would have been cured by the verdict. If it was irregular, the defendant should not have joined issue, but demurred. I think therefore that this exception to the replication is unfounded.

II. Let us next consider the verdict.

It is alledged to be defective in two respects. 1st. That although it finds a number of the debts of Kerr and Hawthorne to be unpaid, yet it assesses no damages to the plaintiff on that account. 2dly. That it finds a debt of \$1844 and 25 cents to be due to four persons jointly; whereas no such debt was put in issue, but a several debt to each of those persons.

1. It is undoubtedly true, that the jury are bound to assess damages, on each of the breaches assigned by the plaintiff; and

if they have not done so, the verdict is defective. It is the duty of the court to support the verdict of a jury, if it may legally be done. The court have power to supply substantial omissions ; but if the jury have expressed their meaning in an informal manner, the court not only may, but are bound to mould it into form. In the present instance, they have expressed themselves very awkwardly ; but I think, it sufficiently appears from their words, that their intention was to find damages, to the amount of the specified debts.

They have in the first place, found for the plaintiff the penalty of the bond, \$250,000, with 6 cents damages and 6 cents costs. They then proceed to say, that the said sum in part arises, because the defendant has not indemnified the plaintiff from all suits, &c. on account of debts of Kerr and Hawthorne, in this, that the plaintiff hath suffered loss, &c.; by a certain suit and arrest, &c. to the amount of 10 cents, which they assess for his damages, by reason of such loss, &c. and also in this, that there were before 1st of April 1797, and still are divers debts due from Kerr and Hawthorne, to sundry persons, &c.; (particularizing the names of the creditors and the sums due to each.) Having thus said, the plaintiff has suffered damages by the non-payment of those debts, the amount of every one of which is ascertained, they proceed to say, that the rest of the said sum of \$250,000, remains for the use of Anne Lang and William Hawthorne, &c.

What is meant by the rest of the said sum ? Is it meant, the remainder, after deducting 10 cents, found for damages, on account of the first breach ? Certainly not ; because after finding those 10 cents, they have mentioned all those debts. Can there be a doubt, but the word rest means the remainder, after deducting both the 10 cents, and the amount of the debts ? If their meaning was, to deduct the amount of the debts, it is tantamount to finding damages ; because that amount could not be deducted upon any other principle. I am therefore of opinion, that the jury have informally found the amount of those debts, as damages.

2. I will now advert to the other objection, that the verdict has found what was not put in issue. This objection appears to me, to be well founded.

The jury have found a joint debt due to four persons ; whereas the pleadings put several debts to each of those persons, in issue. The plaintiff's counsel have called on the court to rectify this error by their notes ; but they have no notes by which they can rectify it. The written verdict delivered by the jury, affords no grounds, by which the several debts of those four persons can be ascertained. But is there no remedy for this defective finding ? The plaintiff's counsel

suggested, that if the defendant would pay the amount of what was found due to those four persons, they would procure their release of all debts, joint or several. The defendant may do this, if he pleases, but he cannot be compelled to it. It was also suggested by the plaintiff's counsel, that they might expunge this part of the finding from the verdict: but even that is not sufficient. For after such expunging, the verdict is defective in this, that the jury have answered nothing as to those four several debts put in issue. I see no remedy, but by releasing not only the sum of \$1844 25 cts. found by the jury as a joint debt, but also all that part of the breach assigned, which relates to the four several debts. If that is done, I think the verdict would be good for the residue. For the defendant could not be injured by the verdict's answering nothing as to a breach relinquished by the plaintiff. But if that is not done, there must be a *venire facias de novo*.

III. If the verdict is thus cured, the next question is, how is judgment to be entered? Without doubt, for the penalty of the bond. And unless there is some special cause to the contrary, the plaintiff may take out execution immediately for the whole amount of the damages, assessed by the jury. The defendant alledges, that he has shown cause, why this should not be done; and he relies on a written agreement, signed by the counsel on both sides.

The agreement in substance is, that the present action is to stand for the use of all those persons, who are vested with an interest in the bond under the assignments of the plaintiff; but under this restriction, that each claimant shall establish the quantum of debt or damages, by legal process and adjudication.

The expressions are very singular; so much so, that one would almost be induced to think, that the counsel on each side had not explicitly communicated to each other, what was their object. However, we must take the writing as we find it, and endeavor to give it a reasonable construction. I must suppose, that the intention on the part of the defendant was, to secure to himself an opportunity of contesting the amount of each debt. It was equally convenient and far less expensive for him to have this done in the present action, than by each one entitled bringing a separate suit. The creditors were bound by this agreement; because they were represented by the attorney who acted for the trustees. The defendant has contested these debts where he thought proper, in this trial; and in several instances, the jury have found in his favor.

I am therefore of opinion, that there has been an adjudication, within the meaning of the agreement. If there had been no agreement, execution might have gone for the amount of the

whole damages at once. As it is, I think that creditors, or rather the trustees who represent them, may take out execution in such manner as to procure payment of the several debts found to be due by the verdict.

Brackenridge, J. I think the plaintiff is entitled to judgment for the penalty; but that the four debts, which have been found jointly, should be expunged from the verdict, and submitted to the decision of a future jury. They will stand on the same ground, as the company debts, which are hereafter to be established by legal process and adjudication. Complete justice will be effectuated hereby to all parties.

Yeates, J. The law is clearly settled, that the jury must answer to the whole issue, which they have been charged with; otherwise the verdict is bad. Co. Lit. 227, *a.* 2 Stra. 1089. Cro. Jac. 31, 113. 3 Lev. 55. By expunging these four debts, the verdict is made defective. If the assignees will release the defendant from them, it seems to me, the verdict may be sanctioned by the court; but not otherwise. I fully concur in the opinion, which has been delivered by the chief justice.

Smith, J. I also concur in opinion with him.

Messrs. Ingersoll, Rawle and Dallas, *pro quer.*

Messrs. E. Tilghman, Lewis and M. Levy, *pro def.*

AT A CIRCUIT COURT, HELD AT YORK APRIL 1806.

CORAM—YEATES, JUSTICE.

Lessee of GEORGE SHERMAN *against* PRISCILLA DILL.

Articles of agreement for the sale of lands, whereby it was agreed that on payment of money at a future day, the vendee should receive a deed, held not sufficient to divest the legal estate, though the words do grant, bargain and sell, were inserted therein, and bonds given for the purchase money.

A deposition taken on a *caveat* before the Board of Property, not allowed in evidence though the witness was cross-examined by the adverse party, and is since dead.

EJECTMENT for 264 acres of land in Manheim township.

Conrad Sherman claiming the lands in question under divers

mesne conveyances, on the 17th December 1792, entered into articles of agreement with George Fridley; whereby the said Sherman in consideration of 950*l.* to be paid as therein after is set forth, grants, bargains and sells to the said Fridley, his heirs, and assigns, a certain tract of land whereon he then lived, called "Killdowney," containing 270 acres 101 perches, surveyed to James Hall on 20th March 1768, under an application dated 25th April preceding, excepting thereout about 6 acres. The money to be paid as follows: Fridley to pay 150*l.* on the 1st March 1793, and on the same day to assign to Sherman a bond of Balson Titler, conditioned for the payment of 100*l.*, on the first April 1795, with interest from 1st April 1793; 60*l.*, to be paid on the 1st March 1795, and the residue in yearly payments of 60*l.*, for which said yearly sums Fridley was to give his bonds. On making the first payment and assigning over Titler's bond, and giving the bonds for the stipulated sums, Sherman agreed to make over the said land to Fridley, by a sufficient deed of conveyance, and give as good and clear a right and title, as Sherman had for the same.

The bonds were given accordingly on the same day, and Fridley received possession of the premises. Afterwards he sold 100 acres, part thereof to his brother Frederick Fridley; and on the 29th March 1794, entered into an agreement with John Caruthers, in behalf of himself and Thomas Dill, (the husband of the defendant since deceased) whereby in consideration of 48*l.*, paid in part of 700*l.*, the stipulated price, he agreed to convey to Caruthers and Dill, and their heirs, 164 acres, the residue of the tract, held under Jacob Sherman. And it was further agreed that 200*l.*, including the 48*l.*, already paid, should be discharged on the 15th May then next, and that bonds should be given with sufficient security for the remaining payments.

Jacob Sherman afterwards commenced an action against George Fridley, on the bond for 150*l.*, payable on 1st March 1793, which came on to trial in the Circuit Court on the 29th April 1800. Fridley set up a defence, alleging that the title was defective, and that his warranty was only special; 51*l.*, 10*s.*, was indorsed as paid on the bond. Sherman under the recommendation of the court, proposed to execute a deed for the land with general warranty, and accordingly filed such deed with the clerk of the court. Judgment was then entered, and a *fiery facias* issued returnable to March term 1801, upon which the lands in question containing 260 acres, more or less, were levied on, condemned, and afterwards sold in pursuance of a *venditioni exponas* to George Sherman, the lessor of the plaintiff, for 2701 dollars, on the 22d August 1801. The new sheriff, under an order

of the court, executed a deed on the 23d April 1803, which was duly acknowledged in open court.

The defendant's counsel contended, that her possession could not be disturbed, as her husband and Caruthers had performed every thing incumbent on them under the agreement with George Fridley, and were still willing to perform the same. They offered evidence to this point, insisting that the words grant, bargain and sell, in the present tense, vested an absolute estate in fee simple in George Fridley in the premises, and here bonds were taken by Jacob Sherman in pursuance of the articles: His covenant to make over the land by a sufficient deed of conveyance at a future day, does not derogate from his actual grant: and consequently every lawful act done by George Fridley was fully validated. The title was divested from Jacob Sherman by the form of his articles. Caruthers and Dill relied thereon, when they made their contract with the person who was in complete possession. And the vendee under the sheriff only acquires the right and interest of the party for whose debts the land was sold at or before the taking thereof in execution. 1 Dall. St. Laws 70, § 4.

The plaintiff's counsel excepted to the testimony as inadmissible. There can be no pretext of deception as to the interest of George Fridley. The second agreement referred to the articles entered into with Jacob Sherman, and therefore put the purchasers upon the inquiry. It amounted to implied notice, if there was not actual notice to them before, of which there can be little doubt.

The articles between Jacob Sherman and George Fridley were never intended by either of them as an actual grant. They could not lead to any mistake: because it is expressly provided therein, that Fridley was not to get his deed, until he had made his first payment of 150l. and assigned over Titler's bond. Here the land has been sold by the sheriff, upon a judgment obtained by reason of the non-payment of this 250l. A paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed at a future day, operates only as an agreement for a lease and not as a lease itself. 1 T. R. 755. S. P. *Doc ex Dinn*, *Cooe v. Care*. 2 T. R. 739. The execution of the bonds can make no difference on the present occasion.

Per cur. The admissibility of the testimony offered, depends solely on the legal operation of the articles of agreement between Jacob Sherman and George Fridley. If the former conveyed thereby his

legal interest in the land to the latter, then the evidence should be received; because, when the vendee had fairly contracted with others, his remaining interest in the land was subject to be sold by the sheriff for his debts, and not the right he had parted with.

In every agreement the intention of the parties is to be considered; Plowd. 290, 292. 3 Burr. 1477. And it is said, 4 Term Rep. 335, there is no rule of law so reluctant, that it will not recede from words, to enforce the meaning of the parties. 1 Atky. 8. If the intention is clear, that an estate should pass, courts will construe deeds in support of that intention, different from the formal nature of those deeds; and on the other hand, an instrument for the sale of lands has been construed as an agreement to convey, though it contained words in the present tense, or "do sell" "and deliver," because it accorded with the meaning of the parties. The present case bears a strong analogy to *Stouffer's lessee v. Coleman*, which was determined at Lancaster, on great argument, at Nisi Prius. There bonds had been given by the vendee, which were prosecuted to judgment. As to the contract made with Caruthers and Dill, it is stated therein, that the lands were held under Jacob Sherman, and it is fully settled, that whatever is sufficient to put the party upon an inquiry, is good notice in equity. 2 Fonbla. 255.

The true intention of these contracting parties cannot be mistaken. The payment of the 150l. and the assignment of the 100l. bond were to precede the making over the land by a sufficient deed of conveyance; and the performance of those acts was postponed until the 1st March 1793. We cannot therefore hesitate to say, that the legal title continued in Jacob Sherman, until those acts were done, and that the equitable interest alone vested in George Fridley, under the agreement, according to the true intent thereof. This legal title was divested out of Sherman, by his deed, executed under the recommendation of this court, containing a clause of general warranty; and the judgment entered in the suit, immediately attached on the lands. Consequently the lessor of the plaintiff, becoming the vendee of the sheriff, the legal and equitable interest in the premises, independently of all sales or contracts made by George Fridley, at any period subsequent to the execution of the original articles, became vested in him by operation of law. The result is that the testimony must be overruled.

The defendants' counsel afterwards offered the deposition of Richard M'Allister, esq., now deceased, taken on the 26th November 1790, previous to a hearing before the Board of Property, on a *caveat* entered by Jacob Sherman, against surveys made

on five warrants granted to George Ross and company, the witness having been cross-examined by Sherman; but the same was overruled by the court, as a point which had frequently been decided by the court.

Verdict for the plaintiff.

Messrs. Duncan, Hopkins and Clark, *pro quer.*

Messrs. Bowie and Watts, *pro def.*

AT A CIRCUIT COURT HELD AT GETTYSBURGH, MAY 1806.

CORAM—YEATES, JUSTICE.

Lessee of JOSEPH SHULTZ *against* PHILIPPINA HAHN.

A legatee under a will may give evidence to impeach the testator's deed, if she has no remedy for the recovery of her legacy payable out of the lands. Presumption of bias in a witness may be removed by an interest on the other side.

EJECTMENT for 100½ acres of land in Berwick township.

Ferdinand Shultz, being seized of the lands in question, on the 29th December 1797, in consideration of natural love and affection and of 150l. conveyed the premises to his two sons, Joseph and John, but reserved the possession thereof for his own use, during the term of his natural life.

The only question was, whether the deeds were unfairly obtained or not. No money had been paid.

Mary Shuler, a natural daughter of the defendant, who was the plaintiff's sister, was offered as a witness to prove the fraud.

The plaintiff's counsel objected to her, on the ground that her grandfather had devised to her 100l. by a will which was not yet proved, dated 1st March 1798, payable out of his real estate by his two sons, Joseph and John; and consequently, that she was interested in setting aside the deeds, in order to establish her own legacy.

It was admitted, that Ferdinand Shultz had no other lands but those he had conveyed to his two sons; and it appeared that the grantees for the consideration money had executed three bonds of 50l. each, to their brother George, the first payable at the decease of their father, and the two others in the years following; but no part thereof had been paid. On inspection of the will, it was evidently predicated on the supposition that the deeds were valid. It contained no devise of the

lands to any person whatever; and the legacy to the witness, could amount to no more than a mere recommendation. Whether the deeds were valid or not, neither Joseph nor John Shultz, were bound to pay the legacy.

The court therefore allowed the witness to be sworn, as she did not appear to be interested.

George Shultz and Barbara his wife, were also admitted as witnesses for the defendant, on his voluntarily depositing his bonds in the hands of the clerk of the court, to be canceled in case the jury should by their verdict, annul the deeds.

The money due on his bonds, was at least equal to his undivided fourth part of the lands, supposing that his father had made no disposition thereof; and therefore he could have no preponderating interest to bias his mind in the present controversy.

The jury annulled the deeds by finding a verdict for the plaintiff, for one equal undivided fourth part of the lands.

Messrs. W. Ross and Barber, *pro quer.*

Messrs. Bowie and Kelly, *pro def.*

AT A CIRCUIT COURT, HELD AT CARLISLE, MAY, 1806.

CORAM—YEATES, JUSTICE,

Lessee of JAMES M'TEER, WILLIAM M'TEER, WILLIAM ADLEY and ELIZABETH, his wife, ROBERT M'TEER, JOSEPH M'TEER and JOHN M'TEER, *against* LEONARD BUTTORFF.

Improvement rights in early times, have been considered as chattels, to many purposes, and sold as such by executors and administrators. But as between vendor and vendee and their heirs, where no bill of sale has been given, the equitable right continues in the administrators though possession has been delivered, where the consideration money has not been paid.

One claiming an improvement, and taking out a warrant including the same, and obtaining a survey, is in general concluded by the lines thereof, but under certain circumstances, this rule does not seem to hold.

EJECTMENT for 226 acres, 148 perches of land, in East Pennsbro' township. The legal titles on both sides were as follow.

The plaintiff claimed under a warrant to William M'Teer, the father of the lessors, dated 7th September 1753, for 100 acres, including his improvement adjoining John M'Clellan and Adam

Calhoon, in East Pennsbro' township ; the said William, having paid on the 1st August 1753, to John Armstrong, deputy surveyor, 5*l.* to take out the warrant.

On the 29 June 1767, the said William M'Teer entered an application for 100 acres, bounded by Samuel Huston, Adam Calhoon, and his other land. And on the 19th March 1768, a survey was made on both rights of 226 acres, 148 perches, which was not returned into the office of the surveyor general.

The defendant held under a warrant to James Sharron, dated 23d February 1786, for 150 acres adjoining Adam Calhoon and others including an improvement, interest to be computed from 1st February 1768 ; and a second warrant for 55 acres adjoining, dated 13th April 1787. Afterwards, on the 15th May 1787, surveys were made thereon, viz : 165½ acres on the first warrant, and 57½ acres on the second warrant. Upon the 19th June 1787, Sharron obtained a patent ; and on the 1st August 1787, conveyed to the defendant in consideration of 255*l.*, payable in instalments, with a claim of general warranty.

It appeared in evidence, that James Sharron, sen. had first settled and improved on the lands in question, and died thereon intestate. After his death, his nephew James Sharron, and another person, since deceased, took out letters of administration ; and the improvement was appraised at 100*l.* They afterwards contracted with William M'Teer, sen., to sell him the improvement for 113*l.*, and possession was delivered. No bill of sale appeared to have been executed therefor ; but four bonds with security were given to the administrators, dated 7th May 1753, the first conditioned for the payment of 28*l.* on the 1st October 1753, and the other three for 28*l.* 6*s.* 8*d.* each, payable on the 1st October 1754, 1755 and 1756. The two bonds payable in 1753 and 1754, had been taken up and canceled, but the payment of the two last was denied, and the same were put in suit against Dorcas M'Teer and Joseph M'Clure, administrators of William M'Teer, to January term 1773, against which the defendant set up a defence of want of consideration. The actions were continued on repeated rules for trial, and at length were stopped in August 1792, when the surviving administrator of Sharron paid the costs.

On the 17th December 1784, James Sharron, as surviving administrator, obtained an order of Orphan's Court to sell the improvement containing 100 acres, more or less ; the same was advertised as 150 acres, more or less, and sold to John Creigh, at public vendue, for 126*l.* A deed was executed to him on the 21st July 1785, for the improvement, said to contain 200 acres, more or less ; and on the 1st

November 1785, John Creigh re-conveyed to James Sharron, in consideration of 126*l.*, the same quantity of land.

It further appeared in evidence, that William M'Teer, sen. died in 1770, and that his widow and children removed from the land in 1783, leaving a tenant on it, and that the buildings and fences were then much out of repair. Sharron alledged that he had applied for an order of Orphan's Court to enable him to sell, in pursuance of an agreement between the counsel in the actions on the bonds, in order to perfect the title; but his proof in this particular failed. It appeared, however, that his real as well as declared object in selling the lands, was merely to secure the debt due to the estate of his uncle; that Creigh purchased for this purpose by his directions, and was desired to speak, and also to write to the family of M'Teer, who resided in different places, informing them that the title should be made over to them, on their payment of the two bonds and interest, and that Sharron afterwards actually offered to convey the land to James M'Teer, the eldest son, in trust for his brothers and sisters, upon his discharging the bonds, which the other peremptorily refused.

James Sharron settled his administration account, in the register's office on the 22d August 1770, upon which there was a balance of 73*l.* 5*s.* 2*d.* due to the accountant; and the administrators and children of William M'Teer altogether resisted the payment of any money on account of the sale of the improvement. The defendant had made considerable improvements on the land, by erecting a new house and barn, and saw mill, and making meadow, and putting the fences in good order. Six small bonds, and a note due from him to Sharron, payable in the successive years from 1792 to 1797, amounting to 98*l.*, were deposited in the hands of a third person, to await the event of this suit.

Under these facts, Messrs. C. Smith and Watts for the defendant contended, that the plaintiff must fail, as well on principles of law as of moral honesty.

Both the plaintiff and defendant claim under the original equitable title of improvement made by Sharron, sen.; and the warrants were taken out by both for the lands covered by the improvement, in order to acquire the legal title. How is it possible that the children of William M'Teer can recover the same, when they have neither paid nor tendered the money fairly due on their father's contract before they commenced their ejectment? No bill of sale was executed, and until the consideration money was fully paid or tendered, the equitable interest

continued in the representatives of Sharron. Until this was done, no trust could result to the lessors of the plaintiff.

If William M'Teer had procured a survey, to be made under his warrant for 100 acres before 1765, when the new regulations as to surveys were adopted, he might have had the full quantity of 300 acres appropriated to him the improvement right secured 300 acres to him before the American war, provided it interfered with no earlier rights. But he refrained from surveying more than his bare quantity, in order to save the interest on his purchase money from the time of the commencement of the improvement, and took out a new application for 100 acres. The lands of M'Teer were assets for the payment of his debts; and his children cannot inherit under him until his *bona fide* debts are discharged. If their ancestor received possession from Sharron under the contract, and they did not choose to abide by it, they ought to have delivered back the lands. Here, in fact, Sharron has been reinstated in his right and possession by legal transfer. The sum for which he sold the lands will not extinguish his debt and the legal incidental expenses. If the title derived from the sale of the administrators of Sharron was good, the personal representatives of M'Teer were bound to fulfil the contract; if it was bad, the plaintiff founding his claim thereon, is not entitled to recover. But the M'Teers had it in their power to purchase at the public sale, and thereby put the right beyond all question. Nay, it was in fact offered to the eldest son, on payment of the bonds, before Sharron took out his patent. The defendant has made valuable improvements before the commencement of the ejectment in 1800; and it would be the height of injustice to strip him of them after such great delay and laches.

Messrs. Duncan and Bowie argued for the plaintiffs.

It cannot be denied that the plaintiff has the earliest legal title: his warrant, application and survey, are prior in point of time.

To this, it is contended that he has the superadded equitable right of improvement. Were it necessary, the law would presume, that a bill of sale was executed for it: but there is no such necessity.

In early times, before 1761 or 1762, lands held by improvement were considered as mere chattels, and passed by delivery of possession, in the same manner as a horse, or a cow would upon a sale. Repeated decisions have established, that executors without a power to sell under the will, and administrators without an order of Orphan's Court, could pass lands under the prevailing usage: and fair sales, have always been sanctified. Here bonds were given with good secur-

ity, and the money must be considered as actually paid. It was not an executory contract, and the default in not recovering the money, is attributable to Sharron. The absurdity is too gross, to assert, that Sharron by his own act, against the will of the lessors of the plaintiff, might resume the land, which he had sold, in order to pay his debt. M'Teer after laying the improvement, had a right to bargain with the proprietaries, and though Sharron has since obtained a patent, yet both he and the defendant are trustees for the heirs of M'Teer. The family were dispersed, and knew nothing of the sale under the order of Orphan's Court. Were it otherwise, they were not obliged to attend the sale ; inasmuch as the administrators of Sharron had before sold to their ancestor, the order was void in itself : but even this order authorized the sale of 100 acres of land only. Though the improvement was advertised as 150 acres, and conveyed as 200 acres more or less, still it must be resolved into the quantity, which the administrators were impowered to sell : and the warrant taken out by M'Teer in 1753, shows that the claim under the improvement did not exceed 100 acres. The object of Sharron was not to re-convey to M'Teer's heirs, after he took out his warrant on the 23d February 1786. This warrant relinquishes the improvement made by his uncle ; because the interest on the purchase money was to be computed from 1st February 1768, and his uncle died before 1753. Admitting however that this meditated fraud on the commonwealth could prevail, Sharron is foreclosed by the survey made on the first warrant calling for the improvement, and he could convey to the defendant no better right than he himself had. If subsequent to his obtaining his first warrant, another person had taken out a warrant for the adjoining lands, must not Sharron have been contented with his strict measure ? And is not the application of William M'Teer, expressly descriptive of the spot and made near 20 years before, entitled to the same preference ? A warrant and survey operate as notice to all the world, of the extent of the party's pretensions, and he shall be bound thereby. The plaintiff cannot be prejudiced by the sale to the defendant, who was informed of the adverse claim before he has paid his money, and has retained part of it to await the event of this suit : he may moreover look to his general warranty for his indemnification.

Yeates, J. delivered the charge to the jury.

It is agreed, that the plaintiff's legal title has the priority ; but the conflicting rights are grounded on the improvement claim of pre-emption of James Sharron, which will greatly influence the relative titles.

It has not been established, that it was agreed between the counsel in the two suits, that the surviving administrator should apply to the Orphan's Court for an order of sale to complete the title. If that fact had been ascertained, it would have been incumbent on the heirs of William M'Teer to have bid in the land, or to have raised it so high, as after deducting therefrom the monies due on the two bonds, the surplus payable to them would have indemnified them for any expenditures made on the land.

In the early state of the country, say before 1761 or 1762, titles by improvement were considered to many purposes as chattels, and sold as such by executors or administrators, to enable them to pay debts or bring up children. When these transactions have been fair and honest, and the consideration money has been applied to discharge debts or maintain children, they have been always sanctified, as between the original parties, their legal representatives and purchasers under them. In progress of time, when improvements came to be more respected, and supposed to partake of all the qualities of real estate, the rules as to their disposition, and particularly as the property of deceased persons, were the same as those of patented or warranted lands. But it would be difficult indeed to point out a single instance, where it has been even supposed, that as between the original purchasers of an improvement right, or their legal heirs, and the vendors, the right would vest, unless the money contracted for had been paid, or a deed had been given transferring the interest. In all the cases which have occurred within my experience, or which I have heard of, the families of the deceased person, have reaped the substantial benefits of a fair sale, though conducted without the instrumentality of an Orphan's Court, or proper authority in the will. The honest equivalent has been the basis of the usage which formerly prevailed; and without it, in the cases to which my remarks are confined, the heirs of an improver ought not to be stripped of their right. The present instance affords one great prominent feature, that the dispute rests between the children of the purchaser, who has not performed his contract, and the vendee of the administrator under a second sale.

Both M'Teer and Sharron ran great risk in taking out their first warrants for 100 and 150 acres of land. If a third person had obtained in the intermediate periods, a warrant for the adjoining lands, they would in vain have objected there to the extent of the improvement right. It is certainly true that Sharron practiced a deception against the commonwealth, by carrying the interest on his purchase money only as far back as 1st February 1768, instead of the true commencement of his uncle's improvement. His vendee has the good fortune to avail himself of his possession.

The object of the order of Orphan's Court must necessarily have been to sell the whole improvement with all its rights, to their fullest extent.

The case then stands thus. William M'Teer bought this improvement from the administrators of James Sharron, for 113l., and paid two bonds, amounting to 56l. 6s. 8d. Two other bonds of 28l. 6s. 8d. each, payable in 1775 and 1756, remained due, which were not sued until January term 1773, when defences were set up against them. The administrators of M'Teer contended then, they were not bound to pay, because their intestate had got no title by the sale. Now the heirs insist, that a right was vested thereby; or in other words, that though the payment of more than one half of the consideration money had been resisted, they have all the equity of fair and honest purchasers. This is not easily swallowed. Notwithstanding all this, Sharron, the administrator, ought not, on moral principles, to derive any benefit from his sale under the order of Orphans Court, beyond reimbursing himself for his expenditures.

The account might be thus stated:

| | £. | s. | d. |
|---|-------|-----|------|
| Principal of the two bonds each 28l. 6s. 8d. | 56 | 13 | 4 |
| Interest on one bond from 1st October 1755, to 1st August 1787, when the lands were patented, 31 years and 10 months, - - - - - | 54 | 2 | 4 |
| Do. from 1st October 1756, to do. 30 years and 10 months, - - - - - | 52 | 8 | 4 |
| Purchase money of 222½ acres at 15l. 10s. per 100 acres, - - - - - | 34 | 10 | 11 |
| Interest thereon, say for a year, - - - - - | 2 | 1 | 4 |
| Sharron appears by the docket to have paid the costs of the two suits, - - - - - | 12 | 19 | 0 |
| | <hr/> | | |
| | £. | 212 | 15 3 |

To this must be added the surveying and office fees and incidental expenses; and the sums paid by defendant for the land by instalments, must be reduced to cash. The whole aggregate would amount at least to,

£. 42 4 9

Consideration in the defendant's deed, £. 255 0 0

So that though Sharron conceived himself driven to the necessity of an application to the Orphan's Court, he has been subjected to expenses, instead of reaping any personal advantage therefrom. By the second sale, he intended to secure the

debts due to his intestate, and directed information to be given to the lessors of the plaintiff that the land would be conveyed to them, on their discharging the debts due thereon from the estate of their father. According to the account given by one of the witnesses, the same offer was personally made by Sharron to the eldest son in 1787, who wholly refused the same. His first warrant was taken out on the 23d February 1786. The other children were scattered about in different states.

After all this, ought an honest purchaser, who has made many and valuable improvements, without notice, be disturbed in his possession after a lapse of many years? The plaintiff's counsel urge, that he may avail himself of his general warranty, and the 98 $\frac{1}{2}$ yet remaining unpaid of the purchase money. But it is highly questionable, whether he could entitle himself to compensation for his improvements under the covenant of general warranty. This point is *sub judice*, in three cases in bank.

The only real difficulty respects the 57 $\frac{1}{2}$ acres, surveyed on Sharron's second warrant, whether the plaintiff is not intitled thereto under his prior application and survey? If their application had been taken out between the first and second warrants of Sharron, I should have deemed it intitled to a preference, if it had been prosecuted in a reasonable time by a survey. But, considering that Sharron the elder would have been intitled to 800 acres by virtue of his settlement and improvement, under the usage of the proprietary land office, that the refusal by William M'Teer and his representatives to pay a just debt has led to the present difficulty, and more especially that the conduct of William M'Teer in taking out an application in 1767, could not possibly be influenced by any thing done subsequently, and consequent-ly that his money was not paid from a confidence of any foreclosure as to any future adverse right, I incline to think, that for these 57 $\frac{1}{2}$ acres also, a verdict, should pass for the defendant. The children of M'Teer should have tendered the money due from their father, before they could hope to convert the defendant into a trustee.

Verdict for the defendant.

SEPTEMBER TERM 1806, AT PITTSBURGH.

FOR THE WESTERN DISTRICT.

CORAM—SMITH AND BRACKENRIDGE, JUSTICES.

JOSEPH PATTERSON, for the use of DUNNING M'NAIR *against* JAMES SAMPLE, sheriff, and ANDREW ROBERTSON, special bail of EDWARD JACKSON.

Recognizances of bail do not bind lands from their caption, but from the judgments on *scire facias* brought. The court will not direct the appropriation of money arising on sheriff's sales, in a summary way, when the facts are controverted, unless the party has no other remedy.

APPEAL from the decision of Smith, J. on a case stated, at a Circuit Court, held in Allegheny county, in November 1802, as follows :

In this suit, a *venditioni exponas* issued in the Circuit Court, returnable to March term 1802, to sell lands of James Sample, viz. No. 3, 8, 16 and 19, in the 4th district of depreciation lands, commonly called Cunningham's district. The sheriff returned, that he had sold the lands, and had the money ready in court, to pay as may be ordered. The facts were these :

On the 4th November 1795, the defendant, James Sample, mortgaged the lots now levid on and sold, viz. No. 3, 8, 16 and 19, to James Burd, but the mortgage was not recorded until 18th March 1801. On the 20th September 1798, in the Court of Common Pleas, in and for the county of Allegheny, in which county the lands lie, James Sample aforesaid, became special bail for Edward Jackson, at the suit of the plaintiff. Jackson afterwards removed this action to the Supreme Court, by *habeas corpus* ; and on the 2d May 1799, the said Sample and Robertson entered bail above in the same action. In November 1800, judgment was entered against Jackson, and a *ca. sa.* issued to December term 1800, against him. A *scire facias* issued against the special bail, on the 28th February 1801, returnable to the third Monday in March 1801, and judgment was entered thereon on the 14th November 1801.

The question was, shall the mortgagee, be satisfied out of the sales of this land ?

James Burd, the mortgagee, by Steel Sample, his attorney, prayed the court to order full satisfaction of the mortgage aforesaid, out of the monies received by the sheriff from the sale of the mortgaged premises, which was opposed by the plaintiff in this action.

On argument, Smith, J. declared his opinion in the Circuit

Court, that by the neglect of the mortgagee, the judgment creditor was entitled to the monies arising from the sale, but desired that the point should be reserved for the opinion of the court in Bank.

The appeal was entered accordingly in Bank, but the counsel for the plaintiff, objected to the regularity thereof, for want of the certificate of counsel, agreeably to the Circuit Court act. 4 St. Laws 862.

The following supplement was agreed to be added to the case stated; and with this addition, the appeal was to be considered as having been regularly made to the Supreme Court.

The original writ in the action above stated, was directed to the said James Sample, then sheriff of Alleghany county, in which county the lands sold are situate. Sample, the sheriff, arrested Jackson, the defendant, and committed him to gaol. The gaoler suffered him to escape, the said Andrew Robertson being the then jailor, and the said Sample, being the sheriff.

Sample became special bail in the court below, on the 20th September 1798, and after the removal of the cause by *habeas corpus* on behalf of the defendant, Sample and Robertson became bail above on the 2d May 1799, this last entering of bail being after Sample's office of sheriff expired. On the 31st October 1800, judgment was entered against Jackson, and process issued thereupon, *prout* records of Circuit Court.

The appeal was now argued by Messrs. Addison and Sample for the mortgagee, and by Mr. Ross, for the judgment creditor in the action.

For the mortgagee, three points were made. 1. That a recognizance of bail binds lands, only from the judgment on the *scire facias*. 2. A judgment creditor is neither a purchaser, nor to be considered in the light of a mortgagee. 3. An unrecorded mortgage is good and valid against the mortgagor, and all others claiming under him, except subsequent purchasers and mortgagees.

1. The case of *Campbell v. Richardson*, 1 Dall. 131, which was determined on full argument, by Mr. President Shippen, in the Common Pleas, establishes, that recognizances of bail only binds lands from the judgments obtained on the *scire facias*.

The grounds of that resolution are fully reported, and are unnecessary to be detailed at length. But the general opinion of conveyancers and lawyers for a long course of years, our act to prevent frauds and perjuries made in 1772, copying minutely the English statute of 29 Car. 2, c. 3, as to judgments binding lands, and omitting the clause respecting recognizances, and the relative dignity of judgment debts and of those upon recognizance, as to deceased

persons, being settled by law, must be admitted to be powerful arguments in favor of that decision. The late act of assembly, passed 19th April 1794, § 14, also gives a preference to judgments, over recognizances, when it prescribes the manner and order of paying the debts of deceased persons. 3 St. Laws., 527.

Great inconvenience would arise from locking up property from alienation in a commercial and agricultural state. Recognizances of bail are usually taken in double the sum demanded. When they are taken, it is uncertain whether the lands of the principal may ever be affected thereby. Nothing may be recovered in the suit against the principal, or he may be surrendered by his bail. A small sum may be recovered, though the bail may be very high ; and the extent of the recognizance's binding force can never be ascertained at the time of caption. If the plaintiff's doctrine be correct, no prudent man would become special bail for another ; and if he even chose to run the hazard, no man under his alienation would be secure in his purchase. The common law of England only binds here, when it is applicable to our local situation.

2. If a creditor by judgment buys in the first mortgage, he shall not tack this to his judgment as a third mortgagee may. He did not lend his money on the credit of the land, and has no present right therein : he cannot be called a purchaser. 2 Wms. 491.

The same principle is established in 2 Vern. 564. . A judgment is only a general security ; not a specific lien upon land. A *bona fide* purchaser under an agreement shall not be postponed to a judgment creditor. 1 Wms. 277. In Roger's lessee *v.* Gibson and Lea, tried in Fayette county, in October 1804, it was determined by Yeates and Smith, Justices, upon argument, that a judgment creditor was not a purchaser or mortgagee under the act of assembly of 18th March 1775. 1 Dall. St. Laws 703.

3. Under the old act for acknowledging and recording of deeds, passed in 1715, no deed or mortgage, or defensible deed in the nature of mortgages, thereafter to be made, shall be good or sufficient to convey or pass any freehold, or inheritance, or to grant any estate for life or years, unless such deed be acknowledged, or proved and recorded within six months after the date thereof, in the county where such lands lie. *Ib.* 112. But in the noted case of *Levinz v. Will*, 1 Dall. 430, it was solemnly determined, that a mortgage, though unrecorded within six months, would be valid against the mortgagor, and all other persons, except a subsequent grantee or mortgagee, whose deed or mortgage was regularly recorded. *Ib.* 435. By the act of 1775, an

unrecorded mortgage binds from its date, if recorded before a subsequent mortgage. In the principal case, the mortgage to Burd was recorded on the 18th March 1801, and the judgment on the *scire facias* was not obtained until 14th November following.

All statutes made *in pari materia*, shall be considered together as one act. The act of 1775, explains the act of 1715; and as far as it goes, alters and repeals it. *Expressio unius est exclusio alterius*. The object of the legislature is declared in the preamble of the act of 1775, that it was meant to guard "against prior and secret conveyances and fraudulent incumbrances."

The plaintiff in the suit is presumed to know the law, that a recognizance of bail does not bind lands from the caption, and therefore cannot be injured. In addition thereto, the purchaser knew of the mortgage being recorded before judgment was held on the *scire facias*. And it is of no moment to him, how the purchase money is applied. He that has notice, has no equity at all. Gilb. Rep. 15. Notice of a judgment, though not docketed, will bind a purchaser, notwithstanding the express words of the statute of 4 and 5 Wil. and Mary, c. 20, § 3, by which it is declared, that judgments not docketed, shall not affect lands, as to purchasers or mortgagees. 3 Equ. Abr. 684. So one having a second mortgage registered, having notice of a first unregistered deed, shall not set it aside though the statute of 7 Ann. c. 23, gives preference to the deed first registered. Cowp. 712. 2 Atky. 275. 1 Burr. 474. A purchaser with notice, must ever stand in the place of the original party.

Arguments for the plaintiff in the action.

This is a case wherein a sheriff liable by the default of his gaoler, became special bail. The plaintiff's debt was large, and not one third part of it is recovered. Now it is attempted to diminish it 500l. more, and thus eventually lose it. The practice would lead to collusion between the bail, who was the mortgagor, and the mortgagee. It is the interest of both, to strip the creditor of his debt.

At common law a recognizance bound lands from the time it was entered into. It was acknowledged before a judge or other officer, having authority for that purpose, and enrolled in a court of record. 2 Bac. 687. Old edit. 330. When entered, a recognizance took effect from its first acknowledgment, and bound persons and lands from that time. Hob. 195, 196. In *Baskerville v. Brocket*, Cro. Jac. 449, it was argued, whether if execution be sued out against the lands of the bail, it should bind the lands, which he had at the time of the recognizance made, though they were alien afterwards. It does not appear by that

book, that the point was determined. It is true in the abridgement of that case in 3 Danv. 317, it is said to have been adjudged, that the lands were not liable; but in Poph. 132, it appears, that Montague, C. J. and Croke, J. were of opinion, that the lands leased were bound by the recognizance; though Houghton, J. thought differently. And this report of the case has been adopted by Lord Chief Baron Comyns, in the 1st vol. of his digest. (old edit.) 502, (new edit. 708.) See Gilb. Excheq. 83.

The 18th section of the stat. of 29 Car. 2, c. 3, (3 Ruff. Stat. 386,) declares, that recognizances shall bind lands in the hands of any purchaser, *bona fide*, and for valuable consideration, but from the time of enrolment. But this provision arose from the practice of the courts.

By an act passed 23d September 1783, 2 St. Laws 147, mortgages unrecorded between 1st January 1776 and 18th June 1778, which should be recorded within six months, were declared to be valid, except against any subsequent judgment, statute recognizance, &c. which clearly shows the sense of the legislature as to the binding force of recognizances. The act of 5th March 1790, declares, that recognizances given by sheriffs and coroners, when filed in the office of the prothonotary of the Supreme Court, shall be in nature and effect of judgments, obtained in the Supreme Court, and shall bind their lands. 2 St. Laws 771. And the 14th section of the act of 6th March 1778, (1 St. Laws 759,) is made on the ground of a recognizance, affecting lands, like a judgment or extent; and they are classed together. But a previous act had passed on the 28th January 1777, which declared the common law to be in force here. 1 St. Laws 723.

It is not contended, that courts can legislate or mould their adjudications, so as to guard against inconveniences. But if recognizances do not bind from their caption, what will become of those taken in criminal cases, or in the Orphans' Court? The parties and their sureties may sell their land, and remove out of the state. This would be a serious mischief, in the administration of justice.

As to Campbell v. Richardson, it is the authority of an inferior jurisdiction: and notwithstanding what is said there about the debts of living and deceased persons, it is certain, that the same priority does not exist in payment of the debts of the former, as of the latter.

It must be confessed, that in Levinz v. Will, the doctrine was novel, and seems to contravene the plain words of the act of 1715, which avoids all mortgages unrecorded in six months. Many things are said in it, which are besides the point before the court, and are therefore extrajudicial.

As to Rogers's lessee v. Gibson and Lee, it was not the case

of a mortgage, but an absolute deed. The possession of Lea there was material, and would put a creditor on enquiry. The determination was under the act of 1775, and not of 1715 ; and the two laws must not be confounded. Mortgages unrecorded take no effect. But it is otherwise as to deeds, under the law of 1715.

A recognizance enrolled, after the time for enrolling it was elapsed, has been postponed to a judgment obtained before the enrolment, that the creditor might not complain of wrong done him by the order for enrolling the recognizance. 2 Vern. 234.

It is a rule, that whenever equity permits a recognizance to be enrolled, after the time is out, it will not be suffered to affect an intervening purchaser. 1 Wms. 340. S. C. 2 Vern. 750. Whoever conceals his incumbrance shall be postponed. 2 Vern. 370.

A recognizance of bail becomes of no force by entry of the judgment against the principal : but when a *ca. sa.* is taken out, it is notice to the bail ; and if the principal dies after a *ca. sa.* returned *non est inventus*, the bail is fixed. Stra. 511, 717. It is sufficient for the plaintiff's purpose here, if the lands of the bail are bound on the return of the *ca. sa.* or even at the time of issuing the *scire facias*. A surrender of the principal on the *scire facias*, is *ex speciali gratia*, and cannot be pleaded. 1 Lord Raym. 156. On the surrender, the costs on the *scire facias* must be paid. The judgment on the *scire facias*, is only an award of execution, for the debt recovered against the principal. Lilly's Ent. 380.

The plea to a *scire facias* is *nul tiel* record, which implies that the recognizances is a debt of record. On the *ca. sa.* being returned N.E.L., the sum recovered becomes an absolute debt on record. It sounds strangely to assert, that the lands of the bail are not bound, until the award of execution against them, when the judgment against them neither augment nor decreases the debt of record.

Our laws uniformly speak of recognizances binding lands and as we have no statutes merchant or staple here, they can only refer to recognizances of bail. Both before and since the revolution, they have been considered as having preference to debts due by deceased persons.

But a previous question will occur. Have the court the power to interfere between the contending parties in this summary mode ? The purchaser had taken possession of the land, and runs the risk of this concealed mortgage. Notice was not given thereof at the time of sale. The application now is adverse to the purchaser, and is grounded on the equitable discretionary powers of the court.

The plaintiff also has strong equity. His attorney, if he had known

of the mortgage, would not have accepted Sample as special bail. The negligence of a mortgagee will postpone him both at law and in equity. 1 Term Rep. 762. Even notice to a purchaser cannot make that good, which is void in itself. 5 Co. 60. A mortgagee not receiving title deeds, will be postponed on account of the false credit which he gives to the party. 1 Wms. 394-5. Here the security of Burd is gone at law, and he will be held to strict terms, before he will be permitted to injure third persons. The court will not interpose for such purpose. He asks in effect, that the sheriff should be absolved from his responsibility, for his misconduct in office. He was liable for the whole debt for suffering an escape on *mesne* process. If he had sold these lands *bona fide* and without notice, the purchaser would have held them exempted from the mortgage, if he put his deed first upon record. Why should not a sale by the sheriff produce the same effect, on pure principles of equity? Under the supplementary case, the matter is viewed as if the mortgagee had sued out his *scire facias*; but the authority of the court to interfere in the present mode is wholly denied. If lands are sold on a *puisne* judgment, the court cannot direct the monies arising thereupon to be applied to the payment of the elder judgments. It is incumbent on the purchaser to look to the records, and he buys at his own risk, subject to the elder judgments. Under the sheriff's sale, the purchaser only becomes vested with the interest and right, which the debtor had at the time of the judgment rendered against him, on which the sale is founded. No inconvenience can arise on the score of recognizances; they are not incumbrances of a dormant nature; they are accessible to in every instance in Pennsylvania.

The counsel of the mortgagee in reply.

Why was this case stated, if it was not intended that the court should decide on it? Why was Judge Smith called on to determine the legal question in the Circuit Court, and then reserve it for the opinion of the court in bank? Why was the supplementary case filed, if no resolution was meant to be had upon it? The truth is, that all the courts of justice are in the habit of directing the appropriation of monies arising on sheriff's sales, where the money is brought into court for that purpose. The court are guardians of the contending parties, of the sheriff, and all persons having legal incumbrances, as well as of the purchaser. The act of the court can do no injury. The sheriff, as appears by the the case first stated, has returned that he has the money ready in court to pay as may be ordered, and the plaintiff, the mortgagee and purchaser, appear in court by their counsel, and are fully heard. All the material facts have been stated

fully, on which the court below proceeded, and have been restated, at the desire of the plaintiff.

A few of the observations will be replied to. The act of 28th January 1777, only declared, that the common law and such of the statute laws of England, as have theretofore been in force in the province, shall be extended. It is well known, that every part of the common law has not been adopted in this state.

The act of 10th June 1778, does not define the time when recognizances bind lands. It is agreed they have a binding force; but whether they have their operation immediately on their caption, or afterwards upon the judgment on the *scire facias*, is a point on which we disagree.

The same remark applies to the acts of 6th March 1778, and of 23d September 1783. These laws were severally of a temporary nature, and preceded in point of time, the decision in *Campbell v. Richardson*, which took place in June term 1785. No inference favorable to the plaintiff's cause can be deduced from the act of 5th March 1790, but the reverse. If the recognizances of sheriffs and coroners bound their lands *ipso facto* from the times of being entered into, it was idle and superfluous in the legislature to declare, that they should have such operation, and be in nature and effect of judgments in the Supreme Court. The plea of *nul tiel* record to a *scire facias* upon a recognizance of bail, proves nothing. It certainly was a record when filed, but whether it bound the lands of the cognizor from the caption, or at a subsequent period, is a question widely different.

As to the plaintiffs pretended equity, he had, it is true, a right of action against the sheriff for the escape of Jackson, upon mesne process; but if Jackson's circumstances were bad, little could be recovered from him. There is a most striking distinction between an escape on mesne and judicial process, in a suit against a sheriff. It cannot be pretended, that the situation of the plaintiff was deteriorated, by accepting Sample and Robertson as special bail, instead of bringing an action against the sheriff or gaoler. At the time of the escape, the sheriff's recognizance was taken in the sum of 2000*l.*, and the property of the two defendants has been sold by the late sheriff of Allegheny county to the amount of 11,000 dollars. The simple question awaiting the decision of the court is, has the plaintiff in the suit, or the mortgagee, the first lien on the lands sold?

Brackenridge, J. This court has not exercised the power of appropriating the money arising from sales made by sheriffs.

Tilghman, C. J. Such power has certainly been frequently used, which was confirmed by Yeates and Smith, Justices, who on being appealed to, said, it was matter of constant practice in Bank.

Tilghman, C. J. It does not appear to me that the facts are sufficiently stated, to enable us to form an opinion on them. This forms an insuperable objection against exercising the summary powers of the court in a case of this nature. I think, however, the opinion of Mr. President Shippen, in *Campbell v. Richardson*, cannot now be shaken, as to the period when a recognizance binds the lands of the bail. We have never adopted the whole of the common law in this government. Husband and wife selling the lands of the feme without levying a fine, and the dower of a married woman being subjected to the payment of the debts of the deceased husband, form instances of this kind. The difficulty here is, whether equity would, under circumstances similar to the present, uphold this mortgage against the judgment creditor, who is said to have been injured by the negligence of the mortgagee? This is my great doubt.

Brackenridge, J. According to the usage of Pennsylvania, recognizances do not bind from their caption; and such was always my opinion.

In the case of the *United States v. Nicholls*, this court made an order, that this commonwealth should be preferred; but the facts were there fully stated. I cannot however see, that the court can make any order where a sale of lands has been made under a later judgment. Such creditor cannot by his sale affect the earlier liens of prior judgment creditors, whose earlier demands must be first satisfied before such sale can be validated.

Smith, J. I think no sale under a later judgment can affect prior judgments, unless they are fully paid by the sale.

Yeates, J. was silent, from his connection with James Burd, who was his brother-in-law. But his opinion did not go to the extent aid down by the two last mentioned judges.

Curia advisare vult.

On the next day Tilghman, C. J. delivered the opinion of himself and Brackenridge, J.

In this case, the plaintiff having obtained judgment against the defendant, levied on his land, and had it sold by execution. The money being in the hands of the sheriff, a motion was made to the Circuit Court of Allegheny county, that the balance due on a mortgage executed by the defendant to James Burd, dated 4th November 1795, which was not recorded till 13th March 1801, should be paid to him.

Neither the sheriff nor purchaser have made any application to the court, nor does the plaintiff consent to the decision of the dispute between him and the mortgagee in this summary way.

It appears too, by the argument which has taken place, that the parties are at variance with respect to several facts, which might materially influence the court in their decision. If there was no other mode for the mortgagee to obtain redress, we might be induced to proceed to a decision, having first directed the controverted facts to be ascertained by a jury. But as the mortgagee has a plain and simple remedy by proceeding in the usual way on the mortgage, we think it most proper to leave him to that remedy, without making any order for payment of the money, and without intimating any opinion as to the merits of the dispute.

PHILIP AUGHENBOUGH, plaintiff in error *against* ROBERT JOHNSTON
and EDWARD JOHNSTON.

In trespass *quare clausum fregit*, an inofficial private survey is evidence to show the extent of the party's possession.

WRIT of error to the Court of Common Pleas of Beaver county. The action was trespass *quare clausum fregit*, to which the defendant pleaded *non cul et liberum tenementum*.

A bill of exceptions was sealed upon the trial as follows, by the president of the court.

On the trial of this action, the defendant offered in evidence to maintain the said issues, a private survey made at his request by _____, comprehending the land whereon the trespass in this case is alleged to have been committed, as well as the dwelling house of the defendant, in which house he was settled and resided in the year 1796, and hath continued to reside since that period; and prayed the court to admit the same survey as evidence to maintain the said issues.

To this the counsel for the plaintiffs did object; for that it had appeared in evidence, that the defendant had in the year 1796, made an actual resident settlement on a certain tract of land containing 400 acres, which had been surveyed for Dr. William Shippen on the 14th March 1795, in pursuance of a warrant dated 14th April 1792, agreeably to an act of general assembly of this commonwealth, passed 3d April 1792, and is situated on the north and west of the rivers Ohio and Allegheny and Conewango creek; and that the defendant having settled on such tract, being land by the same act of general assembly offered to sale to persons who will cultivate, improve, and settle the same, or cause the same to be cultivated, improved, and settled, was

circumscribed by the bounds of the survey so made in pursuance of the same warrant, and could not in virtue of his said settlement, derive title to any lands out of the limits of such survey, whether such settlement and improvement might enure to the benefit of the warrantee, or in default of the warrantee to the settler; whereupon they prayed the court to overrule the testimony so offered. And the court sustained the objections to the said testimony so as aforesaid offered and overruled the same. To which opinion of the court so as aforesaid given, the counsel for the defendant did except, and prayed the said president and his associates to put their seals to the exceptions aforesaid, according to the form and effect of the statute in such case made and provided, which was done accordingly.

Samuel Roberts, (L. S.)

Messrs. Foster and Campbell for the plaintiff in error. The material question on the trial was, which of the contending parties was in the actual possession of the disputed lands, at the time of the supposed trespass? Though a party may have an undoubted right in lands, yet he cannot support trespass against one having an actual adverse possession: he must entitle himself by a previous recovery in ejectment. It is sufficient to inquire, whether the defendant below might not possibly obtain possession of the *locus in quo*. It cannot be denied: possession and title are distinct in their nature. It was not pretended on the trial, that the defendant came to the land or resided thereon under William Shippen, or that there was any privity between them. He took possession as an actual settler, independently of Shippen, or his lines; nor did the plaintiffs claim under him, though they opposed that title to the defendant below.

There is a plain distinction between an official survey which vests a title to land, and an unofficial survey designating boundary. The latter is an act *in pais*, equivalent to the marking of trees, to show the extent of the party's claim. If one settles on vacant lands, his possession will extend to a reasonable portion of the circumjacent country. The objection made to the private survey is really this: The defendant below had no legal right to the possession of the place in controversy, and therefore he was not in the actual possession thereof.

Mr. Sample for the defendants in error.

Actions of trespass on lands north and west of the rivers Ohio and Allegheny, differ from common suits of the same nature, for injuries done to other lands within the state. Title and possession are synonymous under the act of 3d April 1792. 3 St. Laws 209. The latter accompanied by settlement, constitutes the in-

ciency of title, which is consummated by a duration of five years, and making certain improvements. Here Dr. Shippen's survey was made in 1795, and the plaintiff in error's possessions commenced in 1796. If the latter came in under privity with the former, he is concluded by the lines previously run: if he came in adverse to the former, without taking out a vacating warrant under the 9th section of the law of 1792, his improvements would enure to the use of the warrantee. The defendants in error, claim a tract adjoining to Shippen's survey, and had the possession thereof when the trespass was committed. The pretext for offering this private survey in evidence, is, that it shows the extent of the party's claim; but under the guise of boundary, it was intended to confer title. This it cannot possibly effect, being made without authority. If the plaintiff in error did not choose to be circumscribed by the lines of Shippen, and had come in adversely to him, he ought at least, as other actual settlers have uniformly done, to have applied to the deputy surveyor of the proper district, and procured him to survey, and mark out his lines, under the 9th section of the act.

Per cur. We unanimously think the private survey was overruled improperly. The plaintiff in error, in an action of trespass, had a right to show the extent of his possession: it certainly goes beyond the spot where his house was built, or his fields were cleared. How far this evidence would have operated, it is impossible for us to say, as the title of the defendants in error is not disclosed upon the record: but if they even had a good title, they must have shown on their parts an adverse possession of the premises, before they could legally recover in this form of action.

Judgment reversed.

WILLIAM MILES, plaintiff in error, *against* REMPUBLICAM.

A writ of error in a criminal case is *ex gratia*, but it will not lie until final judgment entered.

WRIT of error to the Quarter Sessions of Erie county.

It appeared by the record, that Miles had been indicted for a misdemeanor, in spiriting away a witness on the part of the commonwealth, in a criminal prosecution.

To this he pleaded *autrefois acquit* specially; viz., that a previous indictment for the same offence, had been found against him at a former session, to-wit, in May sessions 1804, to which he pleaded not guilty in February sessions 1805, and was then

put upon his trial ; that after the commonwealth had given testimony to the jury, the attorney general moved the court that the jury should be discharged, to which Miles gave no consent, and that the same indictment was afterwards quashed. He further averred that the offence in both indictments was the same, and not different ; and this he was ready to verify, and prayed judgment that he might be dismissed therefrom.

The attorney general replied, that Miles was guilty, for that the second indictment was not for the same offence, and that the first indictment was bad in law.

No issues were joined either in law or fact ; but on this state of the pleadings, the sessions on argument determined, that Miles should go on to trial upon the charge in the second indictment. He was tried thereon and convicted, but no judgment was rendered thereon at any time by the sessions.

Mr. Ross, for the plaintiff in error stated to the court two propositions, which he meant to establish. 1. That the discharge of the jury on the first indictment, without the consent of the party charged, amounted in law to an acquittal. 2. That the plea in bar to the second indictment had been tried improperly.

But the court observed, that they did not see how they could determine on this record, no final judgment having been given thereon by the sessions, and directed that the matter should be discussed in the first instance.

Mr. A. W. Foster, in behalf of the prosecution, expressed his willingness to agree to any arrangement, which might bring the legal questions before this court ; that a mistake as to a mere date had rendered the first indictment vicious and repugnant, which had produced the necessity of discharging the jury thereon. The court persisted in the remark, that the record must be regularly before them, before they could proceed on the writ of error.

On the the day following, Mr. Ross admitted, that generally in civil cases, error would not lie before final judgment rendered. The judgment must be given before the day of the return of the writ of error. 2 Bac. Ab. Error C. 466. Old edit. 199. Although it is usually sued out, before the signing of judgment ; because otherwise execution would issue instantly. 1 Term. Rep. 280. Per Buller, J. But criminal cases must necessarily form an exception to this rule. Because the party might be imprisoned, or undergo other corporal pun-

ishment, in the mean time, before the errors could be examined into. In the present instance, there has been palpable injustice, by the court's invading the province of the jury. Issues in abatement must separately be tried by the jury. Leach's Cro. Cas. 138. Roche's case. All errors in the proceedings in a criminal case, are examinable into 3 Comy. 635. If the decision on the plea in bar had been in favor of Miles, it would certainly have been final. But it is objected, that he is remediless, after what he has already suffered, until he receives a further injury! Even where one has been indicted for a capital offence, and died after an exigent awarded, and before attainder, it has been adjudged, that a writ of error lies by his administrators, although the principal judgment was never given; because by the award of the exigent, his goods and chattles were forfeited. 11 Co. 41, *a*.

By the court. Indictments cannot be removed by *certiorari* or writ of error, unless such writs have been specially allowed by a justice of the Supreme Court, or have been sued out with the consent of the attorney general. 3 St. Laws 94, § 7. Such removals are said to be *ex gratia*, not *ex merito justitiæ*. All our books show that final judgment must be first rendered, before the cause can be carried into a superior tribunal by writ of error. 11 Co. 39, *a. b.* 6 East. 336. The inferior court may rectify any errors they have committed, and do the party full and complete justice. It would be futile in us, to proceed in the consideration of errors, where the final judgment may not be complained against by any one.

The writ of error prosecuted by the administrators of the party indicted, cited 11 Co. 41, *a*. forms an exception to the general rule, from the peculiar circumstances of the case. There the party indicted died after the award of the exigent, and no judgment could be rendered against him. But his administrators were damnified thereby, and therefore might well maintain error.

The present writ of error must be dismissed.

The like decision was given in another case, wherein William Kerr and others prosecuted a writ of error against the commonwealth, to the Quarter Sessions of Erie county.

ANDREW SWEARINGEN, esq. *against* Rev. THOMAS LEDLIE BIRCH.

Where the weight of evidence preponderates against a verdict, a new trial will be granted ; and respect is due to the opinion of the judge who tried the cause. Great allowance is to be made for what a man says during the trial of his cause.

APPEAL from the Circuit Court of Washington county.

The declaration was in slander, and contained four counts.

The first and second counts charged the defendant with having asserted in the Ohio Presbytery held at Buffaloe, that he could prove the testimony given by the plaintiff on a certain complaint exhibited by the defendant against the Reverend John M'Millan to be false, and that he had sworn falsely before the presbytery. The third and fourth counts charged him, with asserting in the Circuit Court at Wasington, in a certain cause then on trial between the said Thomas as plaintiff and Hugh Wiley as defendant, wherein the now plaintiff was examined as a witness, that he swore falsely, and that he the now defendant, could prove every word of it to be false.

The cause came on to trial at Washington on the 28th October 1805, before Smith and Brackenridge, Justices, when there was a contrariety of evidence as to the proof of the words laid in the two last counts ; but the justices thought that the weight of evidence preponderated in favor of the defendant. The jury found a verdict for the plaintiff, and assessed his damages on the first and second counts at 120 dollars ; and the like sum of 120 dollars for his damages on the third and fourth, with costs.

The court granted a new trial : whereupon the plaintiff appealed.

Messrs. Addison and Campbell for the plaintiff. It is agreed, that judgment be arrested on the first and second counts, upon the opinion expressed by the court in *Birch v. M'Millan*, a few days ago. Separate damages having been given on the two sets of words laid, this cannot invalidate the finding of the jury, as to the words spoken in the Circuit Court, on the trial of Wiley.

It is also freely agreed, that the matters of law fall within the immediate province of the court, while facts belong solely to the jury. The former justly possess a control over the latter, and may set aside their verdicts, when given contrary to law. When juries assume upon themselves to decide against the known law, they become as dangerous as any set of tyrants, and all certainty and security in the administration of justice are banished from society, unless the judges interpose their summary powers. Still juries are vested with the constitutional

right of deciding on facts, and of determining exclusively on the credibility of witnesses. Courts cannot substitute themselves as juries ; for this would render trials by the latter wholly useless and of no avail. The legal discretion of judges in granting new trials is measured and bounded by certain known rules ; and it has been adjudged, that they will not exercise this power where there has been a contrariety of evidence on both sides, though the judge who tried the cause, should be of opinion, that the strength and weight of the evidence has been against the verdict. 3 Wils. 47. Apply this principle to the case now under consideration. The great question on the trial as to the two last counts was, whether the words were spoken by defendant in the Circuit Court in his defence, by way of communication to his counsel, or out of malice to injure the plaintiff's reputation ? Mr. John Porter, then a student of the law, swore, that he sat near to the defendant, and that the expressions were uttered in a loud voice, as the now plaintiff was giving in his evidence, not by way of instruction to his counsel, but as if he did not care who heard him. It appeared to him to be the impulse of the moment, and the imprudence of the defendant's conduct struck him forcibly at the time. Mr. James Mountain one of the defendant's counsel, gave a different account of what passed, and swore that the words were spoken to him as counsel. The jury have judged of the occasion of speaking the opprobrious words, and have taken into view all the circumstances of the case. They have thought proper to credit the relation given by Porter who is corroborated by the circumstance, that the defendant had before made use of the same expressions in the Ohio Presbytery.

The jurors having thus exercised their constitutional right of deciding on the contrariety of evidence, it is apprehended, that the court will not deem themselves authorized to affirm the order of the Circuit Court in awarding a new trial.

Mr. Mountain for the defendant.

The adverse counsel have been compelled to admit, that unless courts will exercise their undoubted powers in granting new trials, justice cannot subsist amongst us. The rule as to not granting new trials, where there has been a contrariety of evidence, is not correct. Numerous instances appear in the books, and have occurred here, where verdicts have been set aside as contrary to the weight of evidence. Lord Kenyon has said, there are no limitations in granting new trials. They will be granted or refused, as it will tend to the advancement of justice. 6 Term Rep. 638. Lord Mansfield has said, they are indispensably necessary to justice, and are only having causes more deliberately

heard. 1 Burr. 393. According to Lord Parker the best general rule in such cases, is doing justice to the parties ; or in other words, attaining the justice of the particular case. Law Evid. by Lofft. 1150. And according to Lord Holt, a new trial should be granted, even against the certificate of the judge, when a cause requires re-examination. 12 Mod. 336.

It is obvious, that the judges who heard the trial and the examination of the witnesses, are more competent to judge of the testimony, than those who were not present ; and it will be found by adverting to their notes, that there was not that strong marked contrariety of evidence which has been represented by the plaintiff's counsel. Mr. Porter's words were, "I will not be particular, whether the defendant spoke the words to his counsel, or me ; but I am certain that I heard them ; I rather thought he did not direct himself to his counsel, but that it was the impulse of the moment, and I thought it imprudent." My account of what passed at the time, certainly differed from Mr. Porter's ; but my oath was positive and particular, and not as I rather thought. I sat next to the defendant, whose solicitude during the trial with Wiley was great ; I confidently swore to what passed within my own knowledge and hearing, and knew with certainty from my situation, and his manner of raising his head from his hand in haste, that his communication was addressed to me as his counsel ; and from my knowledge of him, I was able to ascertain that his expressions did not exceed his usual tone of voice. Let any impartial persons determine on this statement, which is correctly made from the written notes of the judge, where the strength of the evidence lay. To this may be added, that Andrew Hunter proved the recollection of Porter, as to the situation of the defendant, to have been imperfect ; he corroborated my testimony in that particular.

The present verdict can only be accounted for as an intended set-off to the recovery in *Birch v. M'Millan*. The disputes between the two clergymen have greatly agitated the public mind. But inasmuch as the weight of evidence strongly inclines to prove, that the words charged against the defendant were spoken in his defence, as instructions to his counsel, within the precincts of the bar, and in the cause then trying were relevant, the law protects him therein on the grounds of public policy. And upon the whole, it is hoped that the decision of the Circuit Court will be affirmed.

Tilghman, C. J. delivered the opinion of himself, and Yeates, Justice.

This is an action of slander, which comes before the court on an appeal from the judgment of the Circuit Court of Wash ng-

ton county, who awarded a new trial, a verdict having been found for the plaintiff.

It appears from the report of the judges, before whom the cause was tried, that the words for which the action was brought, were spoken by the defendant during the trial of a cause in which he was plaintiff, and the plaintiff in the present cause was examined as a witness. The defendant was sitting in the bar next to his counsel, and after hearing the plaintiff's testimony, he said, either that the witness had sworn falsely, or he could prove every word he had sworn to be false; and for speaking these words the present action is brought. The Circuit Court charged the jury, that if they should be of opinion, the defendant addressed the words to his counsel with a view to his defence, the action could not be supported; but that the words were actionable if published by the defendant maliciously, without a view to his defence. There was a contrariety in the evidence. Mr. Mountain, the defendant's counsel, testified confidently, that the words, though spoken louder than they needed to have been, were addressed by the defendant to his counsel and not intended to be published. On the other hand, Mr. Porter, then a student of law who was sitting in the bar near to the defendant, rather thought, that the words were not addressed to the defendant's counsel, but uttered under a sudden impulse of mind.

Mr. Addison, who argued for the plaintiff in this court, has very truly stated, that questions of law are to be decided by the court, and questions of fact by the jury; and that in granting new trials, the court are bound to exercise a reasonable and legal discretion. But it by no means follows from these principles, that if the jury find a verdict, which in the opinion of the court is against the evidence, a new trial ought not to be granted; because by granting a new trial, the court does not assume to themselves the trial of facts; they only submit the facts to the consideration of another jury. A case was cited from 3 Wils. 47, to show, that where evidence is given on both sides, a new trial is not to be granted. But this not a sound principle. There may be a contrariety of evidence, and yet the weight of it greatly preponderates against the verdict; and in such cases, justice requires that there should be a second trial. And so are the authorities.

It is extremely difficult for this court, who did not hear the evidence, to ascertain with precision what was the weight on either side. The notes of the judges who tried the cause, cannot give so clear an idea as if we had heard the testimony. For this reason, we are in duty bound to pay very great respect to the opinion of these judges, espec-

ially as they have ordered a new trial, which insures the plaintiff an opportunity of attaining the justice of this case.

Besides, we are of opinion, that great allowance is to be made for what a man says when attending the trial of his own cause. He certainly had no right to make that circumstance a cover for malicious slander ; but he ought to be indulged in the utmost freedom in communicating his sentiments to his counsel or the court. For a man has a right to address himself to the court in his own cause. The more we reflect upon the subject, the more we shall be convinced that it will not promote the peace or happiness of society, to encourage actions of slander for what is said by the parties concerned during the trial of their causes.

In the case under consideration, the counsel for the defendant has sworn, that he is certain his client addressed his words to him. Of this, from the nature of things, the counsel is a better judge than any other person ; nor does any witness undertake positively to contradict him. He is moreover fortified by Alexander Hunter. The jury were undoubtedly the judges of the credibility of the witnesses, and no doubt they have conscientiously decided according to their judgment. But as the judges who tried the cause, were dissatisfied with the verdict, and their notes of the evidence do not warrant us in concluding that they erred in judgment, we think it on the whole most conducive to justice, that the matter should be submitted to the consideration of another jury.

The judgment of the Circuit Court is therefore affirmed ; and the costs in this court must abide the event of the new trial.

ROBERT M'NAIR DAVID M'NAIR, ALEXANDER M'NAIR, WILLIE M'NAIR,
DAVID M'NAIR, jr. and JOHN MEDDOCK, plaintiffs in error, *against*
REMPUBLICAM.

Indictment for a forcible entry into a messuage, tenement, and tract of land, without mentioning the quantity of acres, held bad after conviction.

WRIT of error to the Quarter Sessions of Crawford county. The indictment was found in July sessions 1801, and stated, that Robert M'Nair, &c. on the 17th day of June in the year of our Lord 1801, at the township of Waterford in the said county of Crawford, and within the jurisdiction of this court, with force of arms and a strong hand, into the messuage, tenement, and tract of land, of a certain John Vincent, then and there being the free tenement of the said John Vincent, and upon the possession of him, the said John Vincent, did enter, and with the like force of arms, him the said John Vincent of the said

messuage, tenement, and tract of land did disseise, and from the same, did expel, and remove him, the said John, and from the aforesaid day of June, in the year aforesaid, from the said messuage, tenement, and tract of land, with force of arms and a strong hand, at the township and county aforesaid, have hitherto kept out, and still do keep out the said John Vincent, to the great disturbance of the public peace, contrary to the form meaning and effect of the statutes and act of assembly in such cases made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

Mr. Baldwin for the plaintiffs in error, excepted to the indictment as being indescriptive of the land. It ought to be described with convenient certainty, as well to enable the party to make his defence, as to warrant the writ of restitution. 1 Hawk. 147. c. 64. § 37. It ought to be as certain as a declaration in ejectment, which states the quantity of land demanded. Runn. Eject. 32. What precise idea can be annexed to a tract of land? It may contain 200, 300 or 400 acres. Here it is left at large. Besides the indictment does not state that the land was in the possession of Vincent, but that the defendants below entered upon his possession.

Mr. A. W. Foster *pro republica*. The indictment is sufficiently certain. The township, county and the late possession of Vincent are mentioned. A tract of land north and west of the rivers Ohio and Allegheny, means in common parlance 400 acres, as no more can be taken up under one warrant. In Burn's, Just. 203. 14th ed. there is a precedent of an indictment for a forcible entry into a certain messuage, with the appurtenances in _____, in the parish of, &c. in the possession of a lessee. Upon a conviction, the prosecutor must take possession at his peril, as in ejectment. But though the indictment may be vitious as to the land, it may be good as to the house, according to the authority of Hawkins, as cited.

By the court. The indictment does not pursue the precedents and is not sufficiently certain, in describing the tract of land. There should be at least as much certainty in a criminal prosecution, as in an ejectment. A conviction on such an indictment may operate to great injustice; and however reluctant we may be, we are constrained to determine, that the judgment must be reversed, and re-restitution awarded.

AT A CIRCUIT COURT, HELD AT BEAVER,
SEPTEMBER 1806.

CORAM—YEATES, JUSTICE.

Lessee of Dr. WILLIAM SHIPPEN *against* PHILIP
AUGHENBAUGH.

An application in nature of a vacating warrant, filed under the act of 3d April 1804.
since the ejectment brought, not received in evidence.

EJECTMENT for 400 acres of land, on the waters of Beaver creek.

The plaintiff claimed under a warrant issued under the act of 3d April 1792, dated 14th April 1792, which was entered in the books of the district surveyor, on the 10th June 1793, and a survey made thereon by John Hoge, deputy surveyor, on the 14th March 1795.

The defendant contended, that he had made an actual settlement on the lands prior to the survey. He built a cabin on the ground in 1794, and covered it in, but had no door. The same year, he sold his improvement to John Shoup. In October 1795, some puncheons were split, rails mawled, and three or four acres were deadened. In 1796, the defendant purchased back from Shoup, for 6/., and in the spring of that year he first came to live on the land. Previous thereto, both of them resided with their families in Westmoreland county.

In the summer or fall of 1797, the agent of the population company, for whose use the warrant was taken out, demanded of the defendant possession of the premises, discharging him therefrom; but he refused to quit the land, insisting that the warrant was dead.

In the course of the trial, the defendant's counsel offered in evidence an application, filed with the secretary of the land office, subsequent to the commencement of this ejectment, under the act of assembly passed on the 3d April 1804. *

This was opposed by the plaintiff's counsel.

The act is in itself singular, by changing the terms of the contract with the warrantees, under the 9th section of the law of 3d April 1792. But to give it a retrospective effect on suits instituted previous to the passing of it, would be unconstitutional

* 4 St. Laws 510. Continued until 1st April 1807, by another act passed 28th March 1806. 7 St. Laws 637.

and against all right. Conflicting titles must be tried as they existed, when demand of possession was made by bringing the action. The words of the law are, that such "applications shall for two years, from and after the passing of this act, entitle the applicant, his heirs and assigns, to all the privileges and benefits, that an original or vacating warrant would entitle them to," &c. The application therefore has no other or further effect than a vacating warrant; but as a vacating warrant taken out by the defendant, subsequent to the bringing of the ejectment, could not be received in evidence, it follows, that the application in the present instance must be overruled.

The defendant's counsel answered, that the hardship intended to be remedied by the act under consideration, arose from the decisions of the courts of justice, that the state only could enter on the lands for the condition broken by the warrantees, in not making the settlement and improvement required by the law of 3d April 1792. It did not impair any former contract. If the forfeiture on the default of the warrantees accrued to the commonwealth, the legislature might constitutionally surrender their rights and interests to others, under any stipulated terms, and the warrantees would have no ground of complaint. The intention of the act was, that "in all suits brought or to be brought between warrantees and actual settlers," such settlers as previous to the trial had filed their applications, should be considered as standing in the place of the commonwealth, and "give their improvement and residence in evidence, as fully and with equal force and effect, as if such settler had obtained a vacating warrant."

Per cur. The plaintiff in ejectment must show a good right, before he is entitled to recover the possession of the lands. If the population company have forfeited their interest in the premises, and it be competent to the defendant to object the want of actual settlement and improvement by the company, while he has withheld the possession from them of the land itself, then he will derive a benefit and advantage from his own unlawful act, which is against all law, justice and reason. The uniform decisions of the state as well as of the federal courts, have fully established this point in the negative.

Under the express words of the act of 3d April 1804, upon applications in the secretary's office, on the trial of all suits brought between warrantees and actual settlers, the actual settler is permitted to plead and make proof of his improvement and residence; and such application is declared equivalent to an original or vacating warrant. It will not be contended, that a warrant obtained by a defen-

dant in ejectment after the suit brought could be received in evidence. The present application being placed on the same footing as a vacating warrant, the consequence is, that it is not admissible in evidence.

Messrs. Woods and Collins, *pro quer.*

Mr A. W. Foster, *pro def.*

Verdict for the defendant.

A motion was made for a new trial by the plaintiff: and it was afterwards agreed by the counsel on both sides, that the motion should be heard and determined by the whole court at Pittsburgh next September term, without prejudice to either party.

A new trial was afterwards awarded.

AT A CIRCUIT COURT HELD AT FRANKLIN FOR VENANGO
COUNTY, OCTOBER 1806.

CORAM—YEATES, JUSTICE.

Lessee of WILLIAM CLEMMINS *against* PHILIP GOTTSHALL and
ROBERT JOHNSTON.

A survey made for an actual settler, though out of possession will be received in evidence. The correct idea of an improvement before the American revolution. It corresponds with the definition of a settlement in the act of assembly of 30th December 1786.

EJECTMENT for 400 acres and 131 perches of land in Sugar Creek township.

The case appeared on the evidence as follows:

David Meade, William Johnston, and the aforesaid William Clemmins and Robert Johnston entered into a written agreement at Cussewago, on the 26th December 1794, whereby it was stipulated, that Meade should discover unappropriated lands and make surveys thereon; the other parties were to find all hands and provisions for chain carriers and blazers, and to build good cabins, at least 12 feet square, on each tract: and Meade was to have one third of the tracts, and the other parties the remainder, to be ascertained by ballot or lottery. Meade to receive 20s. for surveying two thirds of the land, for each tract.

In pursuance thereof in January 1795, 13 tracts were discovered and surveyed, and a cabin was built on the lands in dispute, which served as a place of rendezvous. The allotment of the dif-

ferent tracts was made by mutual consent before the several improvements were completed; and the premises in question, with two adjoining tracts, were assigned to Clemmins, by the particular desire of the two Johnstons. They proceeded to erect their cabins in the spring following: but they deserted their lands and separated, on hearing of the murder of two of the inhabitants by the Indians in June 1794, at the mouth of Little Concatt creek. In the close of the same summer, Clemmins came out with another person, and did some work on the two adjoining tracts, but none on that in controversy, and returned in the fall to Westmoreland county. In 1795, he sold his interest in three tracts to one Patterson for 300 dollars. Some of the witnesses testified, that he acknowledged to them to have received part of the purchase money, and obligations for the remainder. Clemmins married in April 1796, and during that spring came out with Patterson and gave him possession. The latter resided and worked on the tract about three months, when he left it much embarrassed, and never returned, the land lying vacant. During this spring, Clemmins improperly obtained the possession of a tract of land above Meadville, claimed by one Magoffin, but an ejectment having been commenced against him, he quitted the same, and sold to John Davis. He afterwards stopped at the improvement of Richard Vansickel, known by the name of Wentworth's tract, and seized on the possession of it as vacant, but his goods were thrown out of the cabin. In August or September 1796, he passed through Meadville with his wife, and two loaded horses, and took possession of the lands in dispute. They again went back to Meadville with their horses, and returned to the cabin with other loads. They had their provisions, blankets and household articles about them, and continued in the cabin a few days, and then returned to Westmoreland county, being in want of fodder for their cattle. The wife also was pregnant, and alleged, she could not obtain the necessary assistance in the unsettled state of the country; but he declared his determination to return to the lands. He put a lock on the door of his cabin, and left a number of his household articles therein. In March or April 1797, the cabin was consumed by fire, either by accident or design, and Johnston, one of the defendants, was then seen employed in cutting house logs near thereto. In June following, Clemmins being under an engagement to reap grain seven miles from Greensburgh, sent out his wife and infant child with her father, to take possession of the lands in question; she carried with her a horse loaded with provisions, bed-clothes, and family necessaries, with money to purchase more. She came to the land and required the possession thereof, but the same was refused to her.

by Robert Johnston, who alleged, she had no house there. She then went with her father to Meadville, where she was afterwards joined by her husband. He likewise demanded the possession of the premises from Robert Johnston, but was denied the same by him. The latter continued in possession for some years until he sold to Thomas Russel, with a covenant to make him a good title. Russel afterwards sold to Gottshall. Clemmins became greatly indebted, and was obliged to leave the country for some time. The present ejectment was brought to June term 1806, at which time a house, one end of a barn, and a spring house were built, and 13 acres of land cleared.

In the course of the trial, a survey was offered in evidence on the part of the plaintiff, made for him on the 11th February 1806, by Samuel Dale, the deputy surveyor of the district, under his actual settlement. This was objected to, as the 8th section of the act of 3d April 1792, 3 St. Laws 311, authorizes surveys in the cases only of settlers actually in possession of the lands at the time of application to the deputy surveyor. The plaintiff should have applied for an order of the Board of Property whereon to found his survey.

The plaintiff's counsel answered, that if this construction of the law was correct, no person defrauded of his possession as an actual settler, before he had obtained a survey, could ever receive redress. It is well known, that unless a *caveat* be filed, the Board of Property will not give an order of survey in the case of settlements. But the language of the act is in the past tense: "The deputy surveyor of the proper district shall, upon the application of any person who has made an actual settlement and improvement, &c., survey and mark out the lines of the tract," &c. Ejectment is a possessory action; and this court has determined, that an official survey must precede the recovery by an actual settler.

Per cur. The survey must be read in evidence. Whether there was such an actual settlement by the lessor of the plaintiff as would authorize the survey under all the circumstances of the case, must in the sequel of the cause come before the court and jury for their decisions.

The counsel on both sides fully addressed the jury. Yeates, J. afterwards observed to them, that the case presented three several questions for decision.

1st. Whether the lessor of the plaintiff could be considered at any time as an actual settler.

2dly. Whether he had forfeited such claim.

3dly. Had he been guilty of laches in not bringing this suit earlier.

The opinions entertained in the country after the passing of the act of 3d April 1792, as to improvement cabins, were highly erroneous. The great object of the law was to encourage the settlement of the country and the cultivation of the soil, by the hardy and sturdy yeomanry. Preference was given to persons who were willing and desirous to settle and improve the lands north and west of the Ohio and Allegheny; but it was indispensably necessary, that they should unite both characters. Hence it results, that the cabins built on the thirteen tracts gave no efficient pre-emption right to the lands thereby intended to be secured, but operated as scare-crows to keep off others, who entertained the delusive popular ideas of fancied improvements. A settlement in its nature possesses the characteristic features of improvement; but the converse of the proposition is not true.

The 9th section of the act of 3d April 1792, prescribes the duration of the settlement, the extent of the improvement, and the period within which it shall be made; but it does not define what a settlement is. 3 St. Laws 212. For this definition we must recur to the act of 30th December 1786, 2 St. Laws 487, which declares, "that by a settlement shall be understood an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war." It corresponds with the correct idea of what was called an improvement, before the American revolution. The *animus residendi* in the first instance, and the *animus revertendi*, in the case of evacuating the possession for a temporary purpose, were deemed of the essence of a *bona fide* improvement. The girdling of a few trees, or mauling of rails, without unequivocal intentions of residence, and return to the premises to make it a place of permanent abode, were not dignified with that character. But a man, who had erected his cabin, sowed the land, enclosed a field, or made any other preparation which clearly evinced a full determination to make the place his home and immediate settlement, might with safety leave the land in order to bring out his family, or to perform other acts of duty or charity; and, provided he returned within a reasonable time, his possession was secured to him. If he stayed away an unreasonable time, he would be presumed to have abandoned his original intention of settlement: but this, like other presumptions, might be repelled by proof. It would be incumbent on him to account for his long absence in a satisfactory manner. Sickness or other inevitable accident on

such occasions, have always been considered as sufficient excuses for such delay in returning.

Patterson appears to have been the first actual settler on the lands in question. He resided on and worked the land near three months. But he abandoned the tract and never returned. In language of the act of December 1786, his settlement was not continued from time to time.

Clemmins, the lessor of the plaintiff, succeeded to the vacant possession. But to him it has been objected that he had sold the tract, and received at least a part of the consideration ; and further, that he was then pursuing other objects of speculation, in possessing himself of Magoffin's and Wentworth's tracts, above and below Meadville. To this it is fairly answered, that the claim of Patterson was wholly forfeited by his abandonment, and that he, or any other on his behalf, never returned to the land ; in consequence thereof, any person desirous of settling and improving, might lawfully enter on the possession ; and the former possessor being indebted to him for the premises, was a strong equitable circumstance in his favor. No impropriety of conduct as to the two tracts of land about Meadville, can invalidate his pretensions to the lands in question. Subsequent to those transactions he resumed the possession of this tract, with his wife, and had no other home. Every thing he possessed in the world was contained within the logs of his cabin. I abominate the practice, which has prevailed in this new country, of slipping into the possessions of others, who, in many instances, have been necessitated to quit their settlements for temporary purposes : and have frequently, during my present circuit, expressed my decided sentiments on that subject. It is absurd in the extreme, to suppose that the legislature, who enacted the law of 3d April 1792, ever intended to confine actual settlers within the lines of their 400 acres, as if they were enclosed by the four walls of a prison.

To the jury it belongs to decide, whether, when Clemmins took possession of this tract in August or September 1796, he did not show " a manifest intention of making it a place of abode and the means of supporting a family." If they shall be of opinion, from a careful review of all the circumstances, that such was the bent and settled purpose of his mind at the time, then he must be considered as possessing the incipient right of an actual settler. It is the intention unequivocally shown, not the extent of the improvement, which stamps the reality of an actual settlement in the first instance.

If the jury shall determine in favor of the plaintiff upon the

first point, they must then decide whether the claim has been forfeited.

They will judge of the grounds of his discontinuing the possession in the fall ; the want of fodder for his cattle, and the fears of his wife in her pregnancy, on account of the thinness of the settlement; they will also determine whether he absented himself an unreasonable time.

Clemmins expressed his intentions of returning to different persons at various times ; he left most of his property in the cabin, and he placed a lock in the door. His cabin was burnt early in the spring of 1797, which might have come to his knowledge ; when his wife with his father demanded possession in June following, her child was but two months old : and he frequently afterwards repeated his demand on Robert Johnston before he instituted his ejectment. The presumed abandonment is negative by all his acts : but the period of his absence for nine months constitutes the chief objection against him.

The case seems contradistinguished as between the present parties, from common instances of dereliction. Is it consistent with justice, after the agreement of December 1794, under which the premises were assigned to Clemmins, at the instance of Robert Johnston and his brother, that the said Robert should infer an abandonment of the land without the most cogent proof ? This agreement forms a strong part of the plaintiff's case.

Yet if the plaintiff has been guilty of laches, whereby innocent persons have been injured, he ought to be postponed.

If valuable improvements have been made on the land through ignorance of his claim, and monies paid by purchasers for which they can have no redress, the poverty of Clemmins will not avail him for not having brought this suit for ten years. But here the claim was fully known to Robert Johnston, one of the original parties to the agreement : he made the chief improvements on the land, and is responsible for the goodness of the title, nor has it appeared in evidence, that either Russel or Gottshall have paid any part of the consideration money. The objection on the ground of laches, does not seem to hold in the present instance against the plaintiff's recovery.

The jury found a verdict for the plaintiff.

Messrs. S. and A. W. Foster and Farrelly, *pro quer.*

Messrs. Hunter and Marlin, *pro def.*

DECEMBER TERM 1806, AT PHILADELPHIA.

FOR THE EASTERN DISTRICT.

CORAM—TILGHMAN, CHIEF JUSTICE, YEATES, SMITH* AND BRACKENRIDGE,
JUSTICES.JOHN THOMPSON *against* JEREMIAH WARDER.

It is matter of practice to recommit an informal report to the same referees, though against the consent of the adverse part.

MR. DALLAS, for the plaintiff moved, that a report of referees should be recommitted to them, to correct an informality therein.

The plaintiff was ready for trial at the last March term, but at the instance of the defendant's counsel, submitted to a reference. Before the referees met, the plaintiff died intestate, and letters of administration were issued on his estate on the 27th August 1806. Notice according to the rule was served on the defendant, but he did not attend the referees, nor object to their proceeding, on account of the death of the plaintiff. The referees met and examined the testimony; the letters of administration were laid before them, and on the 19th September, they found 1520 dolls. 91 cts. to be due to the plaintiff, and on the next day the report was filed in the prothonotary's office. On the second day of this term, the death of the plaintiff was suggested, and that letters of administration had been granted to Andrew Miller.

It was now moved, that the referees should be at liberty to change the sum found due to the plaintiff's administrator or his estate. It was urged to be a plain oversight and clerical mistake, as the referees had seen the letters of administration; and that the court had exercised a like power in former instances.

Mr. Hallowel, for the defendant, opposed the motion. Judgment *nisi* was entered on the report, and the exceptions have been filed within the four days. By the common law, the suit was at an end by the plaintiff's death; and no statute or act of assembly justifies the alteration prayed for. The referees have found the money due to the plaintiff after his death; and the object of the motion is to

During the first two weeks of the term, Smith, J. was prevented from attending the court by indisposition. Yeates, J. was absent the two last weeks, for the same cause

enter judgment for Miller, the administrator. The adverse counsel should have waited till the day in Bank, and then made their suggestion; or at least they should have entered the name of the administrator on record, before the referees met.

The court declared that they saw no difficulty in granting the motion, though against the consent of the adverse party, in case of an informality. The practice had obtained in other cases, and evidently conducted to justice. The parties at length mutually agreed, that the defendant should be heard on a stated day by the same referees, to make his objections to the sum found due.

HENRY JEISLEY, plaintiff in error, *against* JOHN HAITER.

Court will not set aside a judgment entered by default in the Court of Common Pleas where there has been no rule to plead; but will set aside an execution which has issued before *narr.* filed.

WRIT of error to Berks county.

The case was submitted to the court without argument.

It appeared on inspection of the record that judgment had been entered in the Common Pleas by default, although no rule to plead had been entered; and a *ca. sa.* had issued returnable to January term 1799, though the declaration was not filed till the 5th March following.

The court on the ground of established practice in the Common Pleas, affirmed the judgment, but reversed the proceedings so far as they respected the execution.

Mr. E. Tilghman, for the plaintiff in error.

Mr. Porter, for the defendant.

THOMAS FORREST *against* ROBERT WALN and BENJAMIN R. MORGAN,
assignees of ISRAEL WHEELEN.

The dissolution of a partnership cannot affect the rights of third persons.

CASE for the opinion of the court.

Israel Wheelen and Joseph J. Miller of the city of Philadelphia, merchants, trading under the firm of Wheelen and Miller, were indebted to the plaintiff by reason of a promissory note, given by the said firm to a certain John Dunwoody, and indorsed by him to the plaintiff. This note became due after the partnership aforesaid was dissolved; and another, of which the following is a copy, was given in its place, and the original note canceled or destroyed.

“ \$2000. Ninety days after date, we and each of us promise to pay to the order of John Dunwoody, two thousand dollars value received, February 18, 1797.

“ Israel Wheelen,
“ Joseph J. Miller.

“ Indorsed John Dunwoody.”

On the 2d September, in the same year, Israel Wheelen made a general assignment of all his estate, real, personal and mixed, to the defendants, with power to sell the same, “ in special trust and confidence however, that they apply the same and the proceeds thereof, to the following purposes, that is to say ; in the first place to defray the necessary expenses incurred in the execution of their trust. Secondly, to pay, satisfy and discharge all just demands, which may be made against the said Israel Wheelen, for value received by him in his separate capacity, especially excepting therefrom any notes or indorsements given or made by him for the accommodation of others. Thirdly, to pay and secure to William Montgomery, Robert Waln and George Bickham, of Philadelphia aforesaid, merchants, to the full amount of any advances made by them, or either of them, on behalf of Joseph J. Miller, or the late firm of Wheelen and Miller, by reason of their or either of their notes or indorsements given to him, or drawn or made for his use or accommodation heretofore, or the renewal of such notes or indorsements hereafter. Fourthly, to pay any notes or indorsements made by third persons, for the accommodation of the late firm of Wheelen and Miller. Fifthly, for the discharge of all just debts, which may appear to be due from the aforesaid late firm of Wheelen and Miller and for the payment of any notes or indorsements made by the said Israel Wheelen, for the accommodation or benefit of others. And lastly, for the use of the said Israel Wheelen, his heirs and assigns.”

A judgment was obtained by the plaintiff against the drawers of the said last mentioned note, subsequent to the date of the assignment.

The questions submitted to the court, are these :

1. Are the defendants liable to pay the plaintiff any dividend on the debt due to him, until after the three first objects of the assignment are fully accomplished.

2. Is the plaintiff's demand within the fourth description contained in the said assignment, or are the defendants not liable to pay him any dividend under it?

Mr. Ingersoll, for the plaintiff, claimed to be paid under the assignment, as a debt for which Wheelen had received value in

his separate capacity. The note is joint and several, and on its face confesses value to have been received.

Tilghman, C. J. The first question is reducible to a single point, whether Israel Wheelen, received value in his separate capacity, for the note on which this action is founded. The note is joint and several from Wheelen and Miller, after the dissolution of the partnership. It confesses value to have been received, but at what time or in what capacity, is not expressed. We must look elsewhere then, to find the nature of this value. For if we confine ourselves to the face of the note, it will not appear, whether it was not given for a book account due from Wheelen and Miller. The state of the case explains the matter. A note drawn by the late firm of Wheelen and Miller, and indorsed by Dunwoody, was given up by the plaintiff and canceled. There was no other value received. Now although the firm of Wheelen and Miller was dissolved, as far as they could dissolve it, yet it existed as far as the rights of third persons were concerned. They were still liable to be sued as partners, for debts due from the firm, and could be sued in no other manner. The canceling of the old note discharged them from a joint debt, and not from a debt due from Wheelen, in his separate capacity. And this is all the value he received for the new note. Now it was expressly the intention of the assignment of Wheelen, to give a preference to those persons, from whom he had received value in his separate capacity; and to postpone those from whom he had received value in his joint or partnership capacity. From the special manner in which this clause is expressed, I suspect that when the assignment was made, Wheelen must have had an eye to debts of the nature of that in question. I am of opinion, that upon the facts stated in this case, he received no value from the plaintiff in his separate capacity; and therefore the defendant is not liable to pay the plaintiff any dividend, before the three first objects of the assignment are accomplished.

2d. I am of opinion, that the plaintiff's demand is not within the fourth description in the assignment. This description is confined to persons, who made or indorsed notes, for the accommodation of the late house of Wheelen and Miller. There are no facts stated in this case, which show any such accommodation. Neither do I think that the plaintiff's debt comes within any other description in the assignment. If there was more than enough to satisfy the several classes of creditors particularly described, the surplus was to be returned to Israel Wheelen, and he remained responsible to the plaintiff.

I am of opinion upon the whole, that the plaintiff is not entitled to receive any dividend from the defendants.

Brackenridge, Justice, concurred.

Judgment for the defendants.

JAMES M'KEE, plaintiff in error *against* JOSEPH REIFF.

Deposition overruled, because it went to prove among other things the contents of another paper which was not proved to have been lost.

Writ of error to the Common Pleas of Dauphin county.

The suit was brought against the plaintiff in error by the now defendant, in trespass, for taking of hogs. The now plaintiff justified under the act of assembly of 1705, "to prevent the running of swine at large," 1 Dall. St. Laws 75, but the proceedings before the justice of peace were said to have been lost or mislaid.

To prove that fact, and the nature of those proceedings upon the trial, the deposition of the justice was offered in evidence, who swore that James M'Kee had been legally attested before him, but that his order to view and appraise the hogs, and the appraisement made in pursuance thereof by the persons appointed, were lost or mislaid. This deposition was rejected by the Court of Common Pleas, on the ground, that there was no proof of an affidavit having been made before the justice, that the hogs were running at large, without rings or yokes, without which the justice had no jurisdiction.

On behalf of the plaintiff in error, it was urged, that the deposition stated that M'Kee had been legally attested, in the words of the law; and that every requisite of the act had been complied with.

The court have affirmed the judgment below; because the deposition which was overruled went to prove, among other things, the contents of an attestation or affidavit, which was not proved either to be lost or mislaid.

Mr. Hopkins, for the plaintiff in error.

Mr. Duncan, for the defendant.

AT NISI PRIUS, IN PHILADELPHIA, FEBRUARY 1807.

CORAM—YEATES, JUSTICE.

JOHN COOPER surviving partner of THOMAS COOPER, *against* JOHN MORREL.

Invoice book of an agent, not evidence of the sale and delivery of goods.

INDEBITATUS *assumpsit* for goods sold and delivered.

The plaintiffs were merchants in Birmingham in Great Britain, and sold the goods in question to the defendant, through the agency of one Charles Gillchreest who delivered them.

The invoice book of Gillchreest was offered in evidence, but objected to, because on the face of it no contract is proved thereby, and it appears to be but a copy of the invoices sent by the plaintiffs from England.

And *per cur.* It cannot be admitted under any usage which has ever prevailed. The entries are headed "Birmingham," and are plainly copies. It proves no delivery of the goods to the defendant, by Gilchreest. The day book containing the original transactions as they occurred, proved on oath or admitted, must be produced, or parol evidence given of the delivery of the merchandize.

The parties hereupon agreed to submit the dispute to referees, and the jury were discharged by consent.

Mr. M'Shane, *pro quer.*

Mr. Milnor, *pro def.*

Lessee of DANIEL DAWSON, guardian of JOHN KNIGHT and ISAIAH KNIGHT *against* JACOB MORRIS.

Though a sheriff's deed has been acknowledged after a rule obtained to show cause why the sale should not be set aside, the party on his creditors' may try the fairness of the same before a jury. A person who had released his claim to lands, allowed under certain circumstances to impeach the title.

EJECTMENT for a messuage and lot of ground on the north side of Filbert street and west side of Delaware Thirteenth street.

It was admitted, that Jacob Grubb was seized of the premises, and that they were sold under a regular judgment and execution. On the 22d April 1799, Jonathan Penrose, esq. sheriff, conveyed the same to John Knight now deceased, in consideration of \$215, and the

deed was acknowledged in open court on the 2d June 1800. On the 24th July 1799, a rule of the Court of Common Pleas was obtained, that John Knight should show cause why the sale should not be set aside; and on the 12th April 1800 the following entry was made on the docket: "On argument and motion of Mr. Armstrong, the sale is ratified and confirmed by the court.

The defendant claimed under a subsequent sheriff's sale by virtue of regular judgments and executions, and purchased by the agreement of the judgment creditors, in trust for their use. In March 1802, Israel Israel, esq. sheriff, conveyed to him the premises, in consideration of 250 dollars, and the deed was acknowledged on the 17th March in that year. On the 17th June 1803, a trial was had at Nisi Prius, and Morris obtained a verdict against Knight, on which judgment was entered in September term following.

The defendant's counsel offered to show that the first sale was fraudulent and covinous, through the instrumentality of Thomas Armstrong, an attorney of this court, and that John Knight, the purchaser thereat (father of the two minors, whose guardian had brought this ejectment) was privy thereto; but at all events, he knew the management that had been practised before he paid the consideration money.

The plaintiff's counsel opposed this testimony. The fairness of the sale was a proper subject of inquiry in the Court of Common Pleas, before the deed was acknowledged. The party objecting chose his jurisdiction, and is thereby concluded. An issue might at that time have prayed. Here was no surprise. If money had been brought into court, and the court had directed the distribution of it, all the parties interested would have been bound.

The decree of a court is conclusive on the subject matter, if they have jurisdiction. Bull. 244. Carth. 225. This point was not agitated on the former trial.

It was answered, that it did not appear at whose instance the rule to show cause was entered. In point of fact no witnesses were examined, and the hearing, if any, was on one side. We assert and will prove, that the acknowledgment was obtained, by keeping a material witness out of the way. A recovery by covin is of no effect; and so of all other acts. 3 Co. 78.

Yeates, J. The cases cited, that the judgment of a court having competent jurisdiction of the subject matter, is final and conclusive on the question immediately decided, do not appear

to me to be analogous to the case before the court. Under the act of 1705, § 4, the sheriff is directed "to give the buyer of lands a deed duly executed and acknowledged, as had theretofore been used upon the sheriff's sale of lands." 1 Dall. St. Laws 69. The point decided in the Common Pleas was, that the sheriff's deed should be admitted to be acknowledged; and the act of the court gave the deed no further or other validity, than if it had been acknowledged without opposition. In the latter case such sales have been frequently impeached, and have always been held to rest on their own fairness and merits. But was the law even otherwise, if the original defendant whose lands were sold, had opposed without success the receiving of the acknowledgment of the sheriff's deed, it could not possibly be conclusive on his creditors who were no parties thereto; nor, if one or more of the creditors were parties to the opposition, could it bar other creditors, who did not interfere therein, and might be furnished with new evidence to impeach the sale. In the present instance, it is not shown on what grounds the rule to show cause was obtained, who were the parties who procured it, or whether any evidence was offered to the court upon the hearing to affect the sale.

I therefore think the decision of the Common Pleas not binding and conclusive on the now defendant as to the fairness of the sale; and that it is competent to him to give in evidence to the jury the facts and circumstances from which the fraud in the sale is inferred, that they may judge thereupon. And the case is much stronger, by the present dispute being confined to the heirs of the original purchaser.

Jacob Smith was then called as a witness, but was excepted to, as being interested. The plaintiff's counsel produced a conveyance from Jacob Grubb to the said Smith, of the premises in question, in consideration of 1200 dollars, dated 8th December 1797, antecedent to any judgments obtained against the former; and an assignment thereon by Smith to Knight, in consideration of 60 dollars, dated April 22, 1799.

On inspection of the assignment, no covenant either express or implied, appeared to have been inserted therein, which made him responsible in any event; but it was contended, that it was against the policy of the law, to allow a person to contravene an instrument executed by himself.

The defendant's counsel urged, that Knight's buying in this claim, on the day of the date of the sheriff's deed, and two days after the public sale, was one of the circumstances relied upon to show fraud in him. The voluntary deed to Smith, though it contained a consi-

eration of \$1200, was intended to defraud creditors, and was puffed at the sheriff's sale, to prevent the premises from going off at their full value: to extinguish the claim of Smith and to close his mouth, the paltry sum of \$60 is paid him, which was a debt really owing to him by Grubb. Smith is not compellable to be sworn, but he may give testimony against his right if he chooses; for he then swears against himself. 2 Lord Ray. 1008. And in a late case, it has been adjudged, that in a suit upon a bill of exchange against the acceptor by an indorsee, the payee may be a witness to prove that the bill was void in its creation. 7 T. R. 601.

Yeates, J. It was formerly held, that no man should be allowed to give testimony to invalidate a deed or instrument which he had signed. 1 T. R. 300. 2 Atky. 228. This rule was afterwards confined to negotiable instruments; 3 T. R. 32, 34, 36, and lately, the rule itself has been questioned; and contrary determinations have since taken place. 5 T. R. 570. 7 T. R. 602. Peake's Rep: 6, 52, 224. The law has undergone many changes on this point of evidence. For my own part, I feel great reluctance against a person swearing to destroy the effect of his own deed.

This however does not seem to me, to be such a case. The assignment is a mere release of Smith's right under the deed, and comes before the court under circumstances of great suspicion, not only from the great disproportion between \$1200 and \$60, but that even now the plaintiff does not claim title under it, but makes use of it merely to repel Smith from giving testimony. This evinces the intention of the contracting parties, that the assignment was only intended to bar any future claim by Smith to the house and lot. If however the case is within the rule, the latest authorities warrant the admission of the witness.

Smith was sworn accordingly, and the evidence respecting the fraud in the first sale, was fully gone into. After a very full hearing, the jury retired, and returned with a verdict for the defendant in twenty minutes.

Messrs. Hallowel and Milnor, for the defendant.

Messrs. J. Hemphill and S. Levy, for the plaintiff.

JAMES ENGLES and ROBERT M'MULLEN *against* ROBERT BRUINGTON.

Where a subscribing witness to a will is out of the jurisdiction of the court, his hand writing may be proved as if he were dead.

THIS was a feigned issue to try the validity of the last will of Amelia Sennet, deceased, dated 8th August 1801.

There were two witnesses to the instrument, Edward J. Coale and Robert Taylor. The mark of the testatrix was said to be affixed thereto.

Taylor swore, that he had been sent for by Mrs. Sennet, to draw her will; but that being indisposed, he had recommended to her that Mr. Coale, a young lawyer, should do the business. He was accordingly sent for and drew the will according to her directions, which was signed and published in their presence, and they subscribed their names thereto.

It was admitted, that Coale was in the city, when the will was filed in the register's office, but had afterwards removed to the city of Baltimore in Maryland.

The plaintiff's counsel offered to prove his hand-writing, but this was objected to. The rule of law is imperious, that the subscribing witness to an instrument shall be personally examined, unless he is dead or cannot be found. 7 T. R. 265-6. Where his residence is in a foreign country, or in a sister state, a commission may issue to take his examination. If he is dead, his hand-writing may be proved; but if he has become infamous, or has become interested since the execution of the instrument, it is necessary in addition thereto, to prove the hand writing of the party also. Peake's Evid. 64, 95. Two witnesses are necessary to establish a will by the laws of Pennsylvania. 1 Dall. 286. The provision is founded on principles of public policy. But it is obvious, that if the proof of the hand-writing of a living witness, shall be considered as equivalent to his oath, provided he lives out of the jurisdiction of the court, many frauds may be practised. A witness may affix his name to a pretended will, who would not venture to swear to the due execution of it; and he may be sent abroad, to prevent his being purged upon oath. It may be objected, that there is no mode, by which the will itself may be procured from the register, to attend the commission. But if even the original cannot be obtained, a certified copy might be obtained, which would in most instances answer the same purpose. Besides Baltimore is within the immediate reach of the party. It cannot with propriety be called a city abroad, much less to be in a foreign country. The Circuit Court of the United States, for this district have determined, that a foreign attachment would not lie in such case.

E. contra, it was answered, that the rules of evidence as to wills, are precisely the same as to deeds and other papers. No distinction can be drawn between them. It is true, the plaintiffs might have taken out a commission here ; but of what avail would it have been, if he could not have obtained the possession of the original will ? And how could the will be identified, by a certified copy ? The case of *v. Ralston*, was determined on this ground. Besides, if these difficulties could be obviated, the witness was out of the power of the court, no matter how small the distance was, and his oath could not be compelled. He was to all intents as to the plaintiffs, as if he had been dead, and the rule of law is fully settled, that where a witness to any instrument is abroad, the proof of his hand-writing is sufficient proof of its execution. 1 Espin. Rep. 2. Buller, J. has said, that where an attesting witness is beyond sea, the best evidence which can be obtained, is the proof of his hand-writing. 1 Bos. and Pul. 361. And the rule is now established by the Court of King's Bench in 1802, that if the subscribing witness be out of the jurisdiction of the court, and not amendable to its process at the time of trial, whether he be domiciled abroad or not, evidence of his hand-writing is admissible. 2 East 250.

Per cur. Better evidence will not be demanded than is in the party's power to give. The Supreme Court has no power to oblige the register of wills to deliver out an original paper lodged with him for probate, to be carried into another state ; nor has it any control over a witness out of its jurisdiction. I think it is doubted in one of the books, whether the same credit is to be given to the hand-writing of a witness beyond sea, as if dead. Per Lord Hardwicke. 2 Vez. 460. But from the cases cited on the part of the plaintiffs, it appears, that wherein subscribing witness to a deed or other written instrument is beyond the reach of the process of the court, his hand-writing may be proved as if he were dead. See Peake's Rep. 100. For this is all that can reasonably be expected from the party, under such circumstances. To attempt to prove a mark to a will, would be idle and ridiculous.

The hand-writing was fully proved ; but it afterwards appeared, that the testatrix had married two husbands, viz. Edward Sennet in 1791, and William Tully in October 1796, her first husband being then living. The presumption being fortified by other proof, that her husband Sennet was in full life, when her will was made in 1801, the jury found a verdict for the defendant, who had intermarried with a sister of the deceased.

Messrs. Condy and Hopkinson, *pro quer.*

Messrs. S. Levy and Meredith, *pro def.*

WILLIAM AUSTIN, indorsee of ISAAC TEASDALE *against* JONAS INGHAM.

Court will not permit the plaintiff to enter his replication and join the issues under the arbitration act, after the jury are sworn, without the consent of the defendant.

SUIT on a promissory note. The defendant pleaded *non-assump-sit* and payment, a set-off and the statute of limitations.

After the jury were sworn, it was discovered, that the plaintiff had not replied to the pleas, and that the issues were not joined. Mr. Morgan, for the plaintiff, moved, that the court would permit him to amend, by entering the replication, and formally joining the issues, under the 6th section of the arbitration act, passed 21st March 1806, 7 St. Laws 563, it being plainly within the spirit of the act. This motion, Mr. Hare, for the defendant opposed, his client not being prepared with his witnesses for the trial.

Yeates, J. Unquestionably the intention of the legislature was that formal objections which do not go to the merits of the controversy, shall not be readily listened to. But I can discover their meaning no otherwise, than by their words. It is clear, that the expressions go no further than to permit an amendment of the declaration or statement, and of an alteration of the plea or defence: and I do not feel myself warranted to extend them by construction.

The motion was denied; and the jury were dismissed by the court from giving a verdict.

RESPUBLICA *against* WILLIAM DUANE.

An attachment will sue against a member of congress for a contempt in not attending under a subpoena, if he is not attending congress or going to, or returning from congress.

INDICTMENT for a libel. *Sur* motion for an attachment against a witness, for not attending the court, in pursuance of a subpoena.

Yeates, J. This is a motion for an attachment for a contempt, against Joseph Clay, esq. a member of the house of representatives in the congress of the United States.

It is founded on the affidavit of Walter Franklin, esq. who declares, that he obtained a subpoena for Mr. Clay, between 4 and 5 o'clock in the afternoon of yesterday, enjoining him to appear forthwith; that he called on the said Clay, and mentioned to him, that the attorney general had agreed, that his deposition as to the facts within his knowledge, should be read on the trial of the indictment against

William Duane ; that he requested the said Clay to permit him to take his deposition, who absolutely refused to comply with his request ; that thereupon he presented the subpoena to the said Joseph Clay, which he read to the best of his belief, and after reading the same returned it, with a declaration that he should not attend ; because he conceived it improper to issue a process of the kind against him, as he was privileged from the service of process, in consequence of his being a member of congress.

A witness should be allowed a reasonable time, before his attendance can be required under a subpoena : but I pass over this circumstance, to proceed to the point more immediately to be decided.

The present claim of privilege depends on the 6th section of the constitution of the United States : the words whereof, so far as they respect this matter, are these ; “ the senators and representatives shall in all cases, except treason, felony and breach of the peace be privileged from arrest, during their attendance at the session of their respective houses, and in going to or returning from the same,”

There is no ambiguity in these expressions : they convey precise and definite ideas. The privilege secured to the members of congress of both houses, is freedom from arrest. It cannot be asserted, that the service of a subpoena is an arrest. It is a mere notice to the party to appear and give testimony. But it is certain, that unless the court can constitutionally enforce the attendance of a witness under a subpoena, it will be of little avail to issue that process to a reluctant witness. And this necessarily leads to the inquiry, whether an attachment can issue against a senator or representative in congress, neglecting or refusing to attend, in consequence of a subpoena properly served ?

On the most mature reflection, I am of opinion, that the court may either grant or refuse such compulsory process, according to existing circumstances. That the service of an attachment for a contempt includes an arrest, there can be little doubt ; and it cannot be said, that such contempt is either treason, felony or breach of the peace : but the privilege is confined to the periods of the members attendance at the sessions of their respective houses, going to, or returning from the same. If a member should neglect his duty by not attending the session of congress, or should desert it without leave, he is no more entitled to privilege in such instances from arrest, than a mere private citizen. The court however will not presume a dereliction of duty, unless it is established by satisfactory proof : they will construe the privilege liberally, and by no means weigh the absence of a member in scales too nice. Should it appear to them, that he

is on his return to congress, they will at once refuse the attachment.

The course thereof which I shall pursue, will be to with-hold the attachment, until a proper case is shown justifying such a measure.

I do not feel it to be incumbent upon me to search for proof, should this business be questioned at a future day.

[See the United States v. Cooper. 4 Dall. 341.]

THOMAS DAWSON for the use of ISAAC WIKOFF and GEORGE K. HARRISON *against* WILLIAM PYNSENT TIBBS, DAVID ALLISON and BENJAMIN GRAYSON ORR.

A commission to examine witnesses in which parties have joined, though the rule on which it was grounded was not entered on the docket, the deposition taken under it will be received in evidence, the 37th rule of practice of the Supreme Court notwithstanding. Anything may be given in evidence to show that the plaintiff has no right to recover, and even a general release, under the plea of non-assumpsit. Nonsuit refused on an alleged variance, where the facts are not absolutely ascertained.

The plaintiff declared in special assumpsit, that in consideration of \$1492 and 50 cents, paid to the defendants on the 14th August 1795, they had promised to pay and deliver in twelve months, the same sum in assorted seasonable European merchandize, at wholesale cash prices; that Allison and Orr had been returned by the sheriff, "not to be found" on the *capias*; and that they and each of them had neglected and refused to pay and deliver the same, &c. Pleas non assumpsit and payment, with leave, &c.

The plaintiff produced a written engagement of the defendants, in consideration of \$1492 and 50 cents, to pay and deliver the goods, and there rested his cause.

The defence set up, was, that the note in question was given with six others, which had been canceled and paid, for 199,000 acres of lands in Georgia, and for which no good title had been given, and that there was not above 5000 acres of the whole quantity, for which the defendants had received a legal unincumbered right. To prove this, they offered the examination of one Ezekiel Hudnall taken under a commission, issued from the Supreme Court, upon which the defendant's interrogatories had been filed 12th May 1800, and the plaintiff's on the 30th May following. The commission had been returned on the 30th August 1800, but no rule of court whereon the commission was grounded, appeared on the records.

The plaintiff's counsel excepted to the testimony proposed. The commission is invalid, not being founded on a rule of court, and the authority of the commissioners to administer an oath rests on the rule of court. Besides, no notice of special matters has been given, under the 37th rule of the Supreme Court for regulating its practice,

and the *cestui's que use* who are strangers to the original transaction, are thereby hindered from an opportunity of encountering the evidence intended to be offered. In the case of a special assumpsit, a common law, payment or other legal discharge must be pleaded though it is otherwise on a general assumpsit. Gilb. Law of Evid. 205, 206. 1 Mod. 210.

The defendant's counsel answered, that there certainly must have been a rule for a commission, though from oversight the entry of it had been omitted ; at all events, the plaintiff had joined therein, which takes off the force of the objection. The rule of the court relied upon, was intended to remedy an evil, which existed before ; its spirit was to prevent the surprise of the adverse party by unexpected evidence on the general issue, but the testimony strictly admissible before on such plea, remained unaffected by the rule. On non assumpsit, any thing can be given in evidence which shows that nothing is due ; and the distinction between general and special assumpsit as to this point is denied. Bull. 148. But it is absurd to urge the smallest surprise in a case like the present, the deposition taken under the commission was returned near seven years ago, and operated as full notice of the special matters relied upon.

Yeates, J. The commission actually issued in this instance, affords a strong presumption that a rule of the court had been previously obtained, though it may not have been transferred from the rough minutes of the prothonotary ; the persons named therein would derive the same authority to administer an oath under it in a sister state, as if a rule was now found on our records. It was the act of the court, certified formally. But independently hereof, it would seem that the parties joining in the commission and filing their respective interrogatories, would supersede the necessity of a rule ; because it was virtually an agreement that the deposition taken under those questions should be received in evidence.

As to the 37th rule of the Supreme Court, it left the evidence on the general issue, as it was strictly admissible before ; and I have always understood it to be settled law, that on non-assumpsit, everything may be given in evidence, which shows that the plaintiff has no right to recover. It was formerly held, that a general release formed an exception to the rule ; 2 Barnis 293 ; old ed. Herbert v. Flower et al. ; but the latter authorities remove even his exception. Barr. 1010. 3 Barr. 1353. 3 Espin Rep. 234 Bull. 148. It is however a relief to my mind, that there can be no pretext for surprise upon this occasion.

The testimony was received, but the defendant did not substantiate his evidence thereby.

The defendant's counsel, in their address to the jury, insisted that there was a variance between the declaration and proof. The written engagement purported, that the promise was made in consideration of 1492 dollars and 50 cents, but not for that sum paid by the plaintiff, as he had laid it in his declaration. In reality, the consideration of the note was the sale of the Georgia lands.

The court refused to nonsuit the plaintiff hereupon. The fact is controverted, whether the note was given for lands, and whatever the probability may be, it is not absolutely ascertained. If the supposed variance is insisted upon, let the point be considered is reserved, subject to further argument in Bank, in case the plaintiff shall obtain a verdict.

Verdict *pro quer.* for \$2440 and 72 cents, the amount of the note, and interest up to the day in Bank.

Messrs. Ingersoll and T. Ross, *pro quer.*

Messrs. M. Levy and Franklin, *pro def.*

Afterwards on the 16th March 1807, the *postea* having been returned into Bank, it was agreed, that judgment should be entered for the plaintiff; Mr. Levy admitting, that the jury by their verdict had negatived the ground, upon which his motion for a nonsuit had been founded.

MARCH TERM 1807, AT PHILADELPHIA.

FOR THE EASTERN DISTRICT.

CORAM—TILGHMAN, CHIEF JUSTICE, AND YEATES AND BRACKENRIDGE,
JUSTICES.*ABRAHAM WILT *against* JACOB SCHREINER, special bail of BENJAMIN
DIFFEbach.

The discharge of a debtor under the insolvent acts, is *prima facie* evidence of the service of notices on the creditors, but not conclusive.

Scire facias. The defendant pleaded payment, with leave to give the special matter in evidence.

On the trial, at Nisi Prius, in Philadelphia, on the 18th February last, before Yeates, J. the defendant produced the record of the Court of Common Pleas of Dauphin county, whereby it appeared, that Diffebach, the principal, had petitioned that court on the 17th January 1804, for the benefit of the acts of insolvency, and had thereupon been directed to give notice to his creditors to appear on the 22d February following; that these notices appeared to have been served on the creditors, and particularly on Wilt, the now plaintiff, on the 2d February preceding, by the oath of Robert Skinner; and that Diffebach was thereupon discharged from imprisonment. It was then ruled, that the record was legal evidence, and *prima facie* was proof of the service of the notices, though not conclusive upon the creditors; whereupon the jury found a verdict for the defendant.

Mr. Phillips now moved for a rule to show cause, why a new trial should not be granted for misdirection, and produced the affidavit of the plaintiff, that he believed he should be able to produce proof on another trial, that Skinner was so much intoxicated when he swore to the service of the notices in Dauphin county, that the court with difficulty received him as a witness.

This was urged to be a material circumstance to guide the discretion of the court. But Skinner ought to have been personally examined upon the trial. His oath before the court of Common Pleas, ought not to have been received to effect the plaintiff in a collateral case. It is not alleged that he is dead.

Mr. Condry for the defendant observed, that it could not be doubted but the record was good evidence. Every thing con-

* Smith, J. was much indisposed with a fever during the whole of the term.

tained in it ought to go to the jury, who were to deduce their inferences therefrom. The court will know the difficulty of procuring the testimony of persons who serve the notices of insolvent debtors. Skinner is not to be found. The rule that *omnia præsumentur esse ritè acta* strongly applies in such a case. In *Shields v. Innis*, in the Common Pleas of Philadelphia county, Judge Coxe would not permit evidence to be given, to contradict the propriety of discharge of an insolvent debtor; which was going much further than was done by the judge here. The court upon motions of this nature, will always receive affidavits of material evidence being discovered since the trial, with great caution: but here the affidavit is too loose, to have any reliance placed on it.

Tilgman, C. J. No ground for a new trial is laid by the affidavit. The court could not avoid receiving the record in evidence; and it was proper that the jury should judge upon the whole.

Brackenridge, J. It appears to me that the record was only evidence of the party's liberation from confinement, and not of the service of notice upon the creditors: it is similar in principle to the proceedings of commissioners of bankruptcy, and in a suit founded thereon, the trading, act of bankruptcy, &c., must be proved.

Tilghman, C. J. The Court of Common Pleas had undoubted jurisdiction of the case, and must have been satisfied that the notices were duly served before they discharged the debtor. I agree with the judge who tried the cause, that the record was *prima facie* evidence of the service of notices, but that it might be repelled by other proof.

Rule refused.

JACOB SNYDER and HANNAH his wife *against* SAMUEL CASTOR, administrator with the will annexed of GEORGE CASTOR.

In the argument of a reserved point, court will confine their inquiry to the matter reserved.

Indeb. assumpsit lies on an express as well as implied promise, and where it is executed. But where it is executory, special assumpsit is the proper form of action.

THIS case came before the court, upon a reserved point.

Yeates, J.:, who tried the cause at Nisi Prius, on the 5th March instant, reported the case and evidence as follows: The action was

brought to December term 1801, and the declaration contained two counts. The first was a general *indebitatus assumpsit* for work, labor and service, done by the feme before marriage; the second contained a *quantum meruit*. To which the defendant pleaded *non assumpsit* and payment, with leave, &c., and also the act of limitations.

It appeared in evidence on the trial, that Hannah Snyder, the plaintiff, was the daughter of George Castor, deceased, born in 1748, and was married on the 16th February 1782, being then 34 years old. Before her intermarriage she had lived constantly with her father, and worked in and out of doors, in his service. In 1793, George Castor made a will devising to his daughter Hannah 3*l.*, but provided therein, that she should forfeit her legacy, if she should make demand for her services. Hannah was his daughter by his first wife. It was proved on the trial, that George Castor had several times declared, that Hannah should be paid for her service after his death, and particularly about 1797. His farm, at his death, was worth from 5000*l.*, to 7000*l.* The defendant's counsel made a question, whether the evidence supported the action and declaration; and it was agreed on both sides that the point should be reserved. By consent, the case went to the jury without any address by the counsel or charge by the court, and the jury found a verdict for the plaintiffs for \$1269 and 41 cents.

A point of order arose between the counsel, on which side the argument should commence. The court referred them to the 24th rule of practice, which declares, that in arguing points reserved, the plaintiff's counsel shall begin the argument.

Mr. S. Levy for the plaintiffs. It will not be said, but that the merits of the cause were clearly with us upon the evidence. The verdict will be attempted to be impeached, for want of technical formality in the declaration.

Indebitatus assumpsit will certainly lie for work and labor; so of a *quantum meruit*. Bull. 128. The plaintiff will be entitled to recover on a general count, where a special assumpsit is also laid in the declaration, if he fail in proving the latter; *Ib.* 140, and the day laid in a parol contract is wholly immaterial. 1 Star. 21. 2 Star. 806. A general *indebitatus assumpsit* for money had and received, will lie, when a payment has been made on a contract which is put an end to; but if it continue open, the plaintiff must state the special contract and the breach of it. 1 T.R. 133. But the case of Brooke et al. v. White is similar in principle to the present. There goods were sold at two

months credit, to be paid for by a bill at twelve months, and the goods were not paid for after the expiration of the fourteen months ; and it was adjudged, that the seller might recover in an action for goods sold and delivered ; 4 Bos. and Pul. 330 ; and Mr. Justice Heath in that case, says, he had always understood, that when a contract was executory the party must declare specially, but that when it is executed, he may declare generally. He cites a case in Wilson (probably Alcorn v. Esbrock, 1 Wils. 115,) as decisive on that point. It is presumed, that these authorities will obviate any objections that may be made on the ground of our not declaring in special assumpsit. And if there are any material defects in the declaration, which the defendant can now avail himself of, they must be urged in arrest of judgment. It may however be objected, that this work and labor was done not with a view to a certain recompence, but with a view to a legacy, and therefore the plaintiffs are not entitled to recover ; but to this we answer, that the services were done upon request, and that the testator actually promised payment, which removes all presumption on that score. 1 Espin. Dig. 87. Here has been no surprise. The defendant was fully apprized of the nature and extent of our demand, and adduced all the testimony which his defence admitted of.

Mr. C. Ingersoll for the defendant, contended, that the declaration was defective in several material points, the promise to pay was laid as made to the feme sole, when she was married at the time : the request to pay, was alleged on a day after the suit brought, &c.

The Chief Justice reminded him, that the court were at present confined to the point reserved.

He resumed his argument. The defendant was taken by surprise, in the present form of action : he should have received notice by the declaration, that he was sued upon a special contract. Doug. 24, per Lord Mansfield. Where there is a special agreement, the plaintiff cannot go on a general *indebitatus assumpsit*. Stra. 648.

On a note to repay money with interest, upon payee transferring to him stock, no tender of stock after the death of the party can make this an absolute debt, recoverable in *indebitatus assumpsit*. *Ib.* 653.

Assumpsit lies against an executor, on a promise made by the testator. 10 Co. 77. a. *Indebitatus assumpsit* lies for work done, on a *quantum meruit*, the law implying a promise. 3 Bla. Com. 159, 161.

No sum certain was agreed to be paid for the services of Hannah ; the plaintiffs must therefore rely on the *quantum meruit*, wherein the law implies a promise, to pay a reasonable sum. If reliance is had on this count, the statute of limitations will certainly apply to the whole demand : because she left her father, upon his marriage in 1782. But her demand begins in 1769, when she came of age. The statute must run to the several periods, when the services were performed ; and the promise must refer to the times of performance. But if reliance is placed on the express promise of the father to make compensation, the consequence inevitably follows, that the declaration is vitious for not stating the special contract precisely. On the express promise, a special assumpsit should have been brought. In a special assumpsit to do an act at a future day, performance of it must be precisely alleged, and *quod semper paratus fuit* is not sufficient. Cro. Jac. 583.

The present case falls within the principle of one doing work in expectation of a legacy ; in which instance the party shall not recover. 2. Stra. 728. The payment was to be made at the death of the father : and the promise must refer to a future provision for Hannah, by his last will. Our act of 1705, 1 Dall. St. Laws 53, contains a clause which is borrowed from the British statute of 29 Car. 2, that nuncupative wills shall not supersede wills in writing, and shall only take effect in certain specified cases.

Suits like the present, between the members of a family, ought not to be favored. They tend to the injury of honest creditors, and open a wide door to fraud and collusion. The mischiefs arising from such actions, if encouraged, are incalculable. We have seen in a late instance where a suit was brought in the county of Northumberland, against the personal representatives of Samuel Wallis, deceased, that a most enormous sum was found by referees to be due to a person for services, and that report sanctified by the judgment of a court of justice. Servants, wages are classed with physic and funeral expenses, as to priority of payment of the debts of a deceased person, under the 14th section of the act of 19th April 1795. 3 Dall. St Laws 527.

And if this party shall be so fortunate as to establish his claim to the sum found due to him in that light, he will reap an advantage by a gross trick over fair creditors, under color of law, to which the feelings of every honest mind will be opposed.

Tilghman, C. J., after detailing the case and facts minutely, delivered the unanimous opinion of the court as follows :

Several objections have been taken to the declaration. I do not conceive that those objections can properly be urged on this argument, because the question now before us is not, whether

the declaration is good, but whether it is supported by the evidence. If it is fundamentally bad, the defendant may hereafter move in arrest of judgment. I very much doubt, however, whether any defect which has been pointed out is fatal.

The act of limitations has been insisted on. It does not appear that any point on the act of limitations was reserved. But supposing there was the promise made by George Castor in 1797, being within six years before the action brought, was sufficient to take the case out of the act of limitations.

The only question is, was the declaration so unsupported by evidence, that the judge who tried the cause, might properly have directed the plaintiff to be *non prossed*. The defendant's counsel contend, that the promise proved was express and special, and that the declaration should have contained a special count. As to an express promise being proved, I can see nothing in that which is varient from the declaration ; it states an express promise. Now, though a promise raised by implication of law, supports such a declaration, yet certainly, it is equally well supported by an actual promise ; and nothing is more common than to give actual promises in evidence, in declarations of this kind.

There is another objection of more weight, which is, that the promise was of a particular kind, to pay after the death of George Castor. Undoubtedly this promise is not exactly agreeable to the one stated, which is, to pay when request should be made by the plaintiffs. But objections of this kind, foreign to the merits of the dispute, are not to be favored ; we are to yield to them unless founded on well established principles. If an action had been brought during the life of George Castor, the plaintiffs could not have supported it, because it would have been in direct opposition to the promise. But the day of payment having arrived before the action was brought, the right of the plaintiff was complete ; and I think myself authorized to say, that in such case, according to the principle laid down in *Brooke et al. v. White*, the plaintiff may allege in his declaration that the defendant promised to pay when required. 4 Bos. and Pul. 330. No injury is done to the defendant by this mode of declaring, because the plaintiff must fail, unless he proves that the money was due before the action brought.

The defendant's counsel has painted in strong colors the mischiefs which may flow from a collusion between parent and child, when there is not an estate sufficient to answer the just demands of strangers. There is no doubt but much mischief may happen, unless transactions of this kind are watched with a jealous eye ; but in the present instance

there is no interference with the claims of other creditors : and wherever a case shall arise, where, from the circumstances, there is reason to think that a parent promises wages to his child for past services, with a view of screening his estate from the just demands of other creditors, and where it was not originally agreed that the child should be paid for such services, such promise will be adjudged fraudulent and void. It has been urged by the defendant's counsel, that if a person serves another through expectation of a legacy, in which he is disappointed, he cannot support an action. The law certainly is so, but cannot be applied to a case, where the person for whom the service was done promises to pay for it ; and it is immaterial whether the promise be made before or after the service.

Upon the whole, we are of opinion, that the court could with no propriety have ordered a nonsuit on the trial of this cause ; and the jury who heard the evidence, having found for the plaintiffs, their verdict must stand.

Judgment for the plaintiffs.

JAMES MOORE, jun. for the use of DANIEL DELANEY, THOMAS R. DELANEY, and DAVID MOORE *against* GEORGE HUNTER.

No rule or practice of Supreme Court establishes when the exceptions to a report of auditors in account render shall be filed ; but those exceptions regularly should be taken before the auditors, and returned with the report.

ACCOUNT render. Upon the judgment rendered to account, auditors were appointed by the court. On the 24th May 1804, the special report of the auditors was filed in the prothonotary's office, finding for the plaintiff 2486 dollars and 5 cents, and read in open court in September term following, but no judgment was ever entered on it. On the 8th August 1805, the plaintiff filed a suggestion of allowance and disallowance of several articles therein, containing a number of exceptions to the report ; and on the 9th September following, a rule was obtained on the defendant, to show cause why he should not plead to the several matters contained in the suggestion.

The argument on this rule took place on the 10th September 1805, by Messrs. Lewis and Tod for the plaintiff, and by Messrs. Ingersoll and M'Kean for the defendant. The plaintiff made an assignment on his failure shortly afterwards : and the argument was not concluded until the present term by the same counsel.

On the part of the defendant it was contended, that the plaintiff came too late with his suggestion, it being filed eleven

months after reading of the report. The prothonotary usually enters judgments on reports as matters of course. We know not why judgment was not entered here. But a defendant is no longer an actor: after a report in favor of the plaintiff, he cannot revive, nor demand judgment against him. 3 Atky. 691. A new trial has been refused after four years acquiescence, though no judgment was entered on the verdict. 2 Stra. 995. A motion in arrest of judgment will not be received after the four days. 2 Dall. 229. The general rule of the court is, that exceptions shall be taken to the reports of referees within four days after notice; and why shall it not hold in account render? Can the party have it in his power to hang up the report to any indefinite period of time at his will and pleasure?

But moreover, the exceptions should have been taken and the issues joined, before the auditors. 3 Wils. 73, 99. Imp. Mod. Pleader 149, 150. So it was in 1 Lutw. 49, 50. The party must plead to issue before the auditors. 11 Co. 40. Whatever may be pleaded in bar of the suit, cannot be pleaded before them. 1 Bac. Abr. 21.

The plaintiff's counsel urged, that there was no statute, or rule of practice, which confined the exceptions to four days, on the report of auditors in account render. The case of *Holland v. Mackie* is perfectly analogous, and establishes the practice of this court on the two grounds taken up by the defendant's counsel. There the action of account render was returnable to March term 1797. Judgment *quod computet* was entered, and auditors were appointed on the 4th September 1797. The report of auditors was read, and judgment nisi entered thereon 25th March 1799. The suggestion was filed, and issues were prayed 30th March 1799; and on the 8th March 1800, the exceptions and replication thereto were filed and afterwards tried; so that it is perfectly clear, that the suggestion was received more than four days after the filing of the report, and judgment even entered thereon.

A general summary of the law in actions of account render is given in 3 Woodeson 84, and it is there said, that the proceedings before auditors are in nature of a new action. The report of the auditors is not conclusive. F. N. B. 170. If either of the parties think they do him justice, he may apply to the court for relief. 2 Inst. 380-1. 1 Bac. Ab. 21, F. (37-8) Precedents of the reports of auditors and the proceedings at length, are to be found in 1 Mollory's Mod. Ent. 58. 1 Brownl. 46, b. 47. 2 Brownl. 2. Coke's Ent. 46, b. Rastel 14, b. 15, a. 1 Lutw. 49, 50.

In our case, no judgment has been rendered, which will prevent

the effect of our application. And it is settled law, that though the general rule is, that motions in arrest of judgment shall be filed within the four days, yet they may be received afterwards, if judgment has not been signed. 2 Stra. 845; 1102. Doug. 171. And in *Rex v. Gough*, Doug. 760, (791) the same practice, was adopted on a motion for a new trial; though it must be admitted, that this is now considered to be irregular. 5 Term. Rep. 445.

The court advised upon the subject: and afterwards their opinion was delivered by the chief justice.

Two causes have been assigned against the rule.

1st. That no exception can be received after four days from the time the report was read in court.

2d. That the exception ought to have been taken before the auditors, and cannot be taken after the return of the report.

As to the first exception, it does not appear, that the court has any rule, or any established practice on the subject. This may be accounted for, by the action of account render not being in general use. We do not conceive, that the rule with respect to the reports of referees is applicable to this case, so that until a rule is established, it is sufficient that the exceptions are filed before judgment.

2d. We think the most regular way of proceeding, and by far the most convenient one, would have been to take the exceptions before the auditors, to be returned by them as part of their report. This appears to be the manner of conducting the business, as far as it appears from English precedents, which we have consulted. But as this court suffered exceptions to be filed, after the return of the report in the case of *Holland v. Mackie*, in which no objection was taken on this ground, though other points were controverted, we think it would be unjust, to preclude the plaintiff from the benefit of his exceptions in this case. Although in this particular instance the court allow the exceptions for the reason I have assigned; yet it is not to be understood, that this practice is adopted. On the contrary, it is expected that in future, the exceptions shall be taken at such time and in such manner, as is agreeable to the principles and practice to be found in the books, prior to the case of *Holland v. Mackie*.

Rule made absolute.

RESPUBLICA against JAMES BRUCE, administrator, with the will annexed of NICHOLAS BROSIUS, deceased.

A collector of excise having settled with the comptroller general, which is approved of by the Supreme Executive Council, cannot be questioned by the commonwealth afterwards.

THIS case was tried in Bank on the 8th March 1806, when a verdict was given for the commonwealth, for 1209 dollars and 88 cents, subject to the court's opinion, whether the claim of the state was barred by the 11th section of the act of 18th February 1785, 2 St. Laws 251, under the following circumstances.

Brosius was collector of excise for the county of Berks, and settled his accounts finally with the comptroller and register general on the 18th May 1790, whereby a balance appeared to be due to him of 135l 19s. 5d. This account was afterwards approved of by the Supreme Executive Council on the 26th May 1790. No review or resettlement of this account was had within one year afterwards, but on the 7th December 1801, it was discovered, that the same sum had been twice credited, and a balance was struck as due from the estate of Brosius, of \$1209 88 cents; from which last settlement, the defendant duly appealed. Brosius died early in June 1790.

The case was submitted to the court without argument, by the attorney general, Mr. M'Kean, and by Mr. Ingersoll, for the defendant. They declared, that the principles established by the court in the case of the Commonwealth v. Rittenhouse's executors in September term 1803, upon solemn argument, must govern the decision here.

Per cur. There can be no doubt, but the commonwealth is barred by the express words of the act.

Judgment for the defendant.

ABRAHAM DUBOIS, administrator *de bonis non* of JOSEPH RUSH, jun. deceased, against THOMAS TURNER, surviving partner of JOHN WRIGHT STANLEY, deceased.

Supreme Court possess the incidental power of making rules to regulate their practice, independently of the act of 25th September 1786; but modified their 64th rule, and rendered the certificate of the defendants counsel unnecessary to the obtaining a rule for a special jury.

Mr. LEWIS, for the defendant, questioned the legality of the 64th rule of practice of this court, made on the 30th December 1797, requiring the certificate of counsel to be subjoined to the affidavit of the defendant, before he shall be entitled to a special jury. The act of 19th March 1785, (2 Dall. St. Laws 267, § 17,)

directs, that either the plaintiff or defendant shall lawfully enter a rule for a special jury, in any civil action. And the act of 27th March 1789, § 3, (Ib. 691,) only makes a provision for the defendant's entry of the rule in the Supreme Court, or at Nisi Prius; that he shall make affidavit of having a just and legal defence against the plaintiff's demand, or against some part thereof, before a rule for a trial by special jury shall be entered at his application, except in cases where the title to real estate shall be in question. The court by a reasonable construction of this last law, have a power of directing when such affidavit shall be made by the defendant; which they have done accordingly by their 56th rule made on the 17th September 1791. But they cannot abridge the rights of individuals secured by positive laws. The court have the incidental power of making rules relating to their practice, which may be altered, dispensed with or relaxed on sufficient reasons, for the purpose of obtaining justice. 1 Bla. Rep. 264. 4 Burr. 2271. The act of 25th September 1786, § 6, (2 St. Laws 472,) vests them with full authority to establish such rules for regulating the practice, and expediting the determination of suits, as they in their discretion shall judge necessary; but it is clear, that the legislature could not constitutionally devolve on any body of men their rights of legislation, as to the repealing the positive institutions of both branches of the government. The defendant here is lawfully entitled to a rule for a special jury, upon making the affidavit of defence required by the act of 1789. This has been complied with; and it is presumed, that this court will not insist on the certificate of his counsel in addition thereto, but will modify their rule.

Tilghman, C. J. Afterwards on the 28th March 1807, declared, that the court had modified the rule complained of, so far as to supersede the necessity of the certificate of counsel, previous to the defendant's obtaining a rule for a special jury. The court necessarily possessed the incidental power of establishing rules for the regulation of its practice, independently of the act of 25th September 1786. There was no occasion of deciding here, how far the rule was compatible with the constitution.

The President and Directors of the Delaware and Schuylkill Canal
Company *against* THOMAS PARKER.

Court will permit a plaintiff to amend his *narr.* though under a rule for trial or *non pros*; but not for the purposes of delay, or to vary the nature of his claim, under the arbitration act.

THIS suit, with two others against William Smith and Edward Carroll, of the same nature, stood on the trial list, at the last court of Nisi Prius, under rules to try or *non pros*. They were founded on the defendants' respective subscriptions for shares in the canal company. The declarations, originally filed, contained a general count on the notes, demanding the principal and interest due thereon; but at Nisi Prius, the plaintiff's counsel moved the court to allow them to file a more formal declaration, containing three special counts, and demanding the penal interest of 5 per cent. per month; and in the action against Smith, they introduced seven instalments. Yeates, J. refused to permit the amendments prayed for, conceiving them to be substantial alterations, which were not within the 6th section of the arbitration act of 21st March 1806. 7 St. Laws 562. The defendants counsel then insisted, that nonsuits should be entered according to the rules; but this the judge also refused.

The motions on both sides were now resumed in Bank, in the action against Parker, and were argued by Messrs. Ingersoll and Morgan, for the plaintiffs, and by Messrs. M'Kean, Hallowell, and Condry, for the defendant.

For the defendant, it was contended, that the motion for the amendment should have been made at the last term in Bank, and could not legally be received at Nisi Prius. But at all events the plaintiffs not having filed such a declaration there, as the court would permit, the defendant became entitled to the benefit of his rule. The demand of additional instalments or penal interest, was an attempt to change the nature of the suit in substance, and totally inadmissible. The informality designated in the arbitration act refers to no such case; nor was it ever intended to entitle the party to a new cause of action. The merits of the case would be affected thereby. The words of the law though general, must receive a reasonable limitation. They do not extend to corporations, by name. Here there have been several attempts to amend, though under a *non pros* rule. Such practice will create great vexation and delay, and is directly repugnant to the spirit and scope of the whole law.

For the plaintiffs, it was urged, that the opposition made to the motion for amendment, was a palpable attempt to entangle the plaintiffs in form. The judge at Nisi Prius thought himself

warranted to order an amendment, if it did not vary the nature of the original demand. If the practice should be otherwise, suitors in Philadelphia county would be deprived of rights possessed by suitors in other counties. By the 1st section of the late judiciary act, passed 24th February 1806, 7 St. Laws 384, issues in fact can only be tried at Nisi Prius ; and the arbitration law permits amendments to be made on or before the trial of the cause. To put therefore all the citizens of the state on an equal footing, the Court of Nisi Prius must possess this power necessarily.

The expressions of the section under consideration are, " that in all cases where any suit has been brought, " &c. which certainly include corporation. We do not mean to proceed for more instalments than were originally declared for ; but thinking as we do, that interest follows the subject matter of each particular case, we suppose that penal interest becomes due under the act of incorporation, and that our declaring for the same conforms as well to our original declaration as the true spirit of the arbitration act. The controlling power of the court will always be exercised, so as to prevent the inconveniences of vexation and delay, so much feared by our adversaries.

The plaintiffs were willing and anxious to proceed in the trial at Nisi Prius according to the direction of the judge, with our amended declaration ; but an unlucky oversight having taken place in the conclusion thereof, the defendant's counsel would not agree to an alteration therein after the same was filed. The insisting on the *non pros.* for not going on to trial when we declared ourselves ready to try, with the obliteration of a few words, the insertion whereof had escaped the view of the counsel, is repugnant to every principle of justice. All we desire is, a fair trial of the cause on its true merits.

Tilghman, C. J. delivered the opinion of the court as follows : This action is brought against the defendant for five instalments due on three shares in the Canal company, for which he was an original subscriber. The plaintiffs in their declaration demand the amount of those five instalments, with interest thereon from the time of their becoming due. A motion is now made to amend this declaration, by making large additions in point of form, and one addition which is matter of substance, that is to say, a demand of a penalty, after the rate of 5 per cent. a month for every month's delay, in the payment of the said instalments. It is proper to observe, that this cause was marked for trial at the last court of Nisi Prius, under a rule for trial or *non pros.* The plaintiffs asked leave to amend at the Nisi Prius court ; and the defendant objected to the proposed amendments, which were nearly the same that are now

proposed, and insisted on *non pros.* Judge Yeates who held the court did not think proper to receive the amended declaration in the form in which it was offered by the plaintiffs, conceiving some of the amendments to be improper; nor would he suffer a *non pros.* to be entered, but ordered the cause to be continued.

By the 6th section of the act of assembly of 21st March 1806, it is provided, that no plaintiff shall be nonsuited for informality in his declaration; but, when in the opinion of the court such informality will affect the merits of the cause in controversy, the plaintiff shall be permitted to amend his declaration on or before the trial: and the defendant has the same privilege with respect to his plea; and if by such amendments the adverse party is taken by surprise, the trial shall be postponed till next court.

By the plain and obvious meaning of this act, the plaintiff is entitled to such amendments in point of form, as will afford him a fair opportunity of trying the matter in dispute on its merits. The court therefore can see no reason whatever for rejecting such amendments as are necessary for the plaintiffs in point of form. But shall they be allowed to alter their declaration so as to demand the penalty of 5 per cent. a month? There is nothing in the act of assembly, which authorizes a plaintiff to ask for substantial alterations of his cause of action; and such alterations might be the instruments of great injustice and oppression. The plaintiff's counsel have not contended for such a construction of the law; but they suppose that their original declaration which demanded interest, did in substance demand this penalty, which they now call penal interest. In this the court cannot agree with them. In their declaration they use only the word interest, which cannot be understood any thing but the usual legal interest, of 6 per cent. per annum. They make no reference, directly or indirectly, to that part of the act of assembly which gives 5 per cent. a month; and what is decisive is, that the act gives it, not as interest, but as a penalty.

The defendant's counsel contend, that the plaintiffs are not entitled to the amendment, because they were under a rule for trial or *non pros.*; but the act of assembly makes no distinction between causes where such rules are had, and others; nor do the court conceive that they have any right to make it, or that it would be reasonable to do so even if they had that power; because, a plaintiff who is under a rule for trial or *non pros.*, is as much entitled to a fair trial on the merits of the dispute, as if he had come to trial without such rule.

It has been objected, that plaintiffs may make a mischievous use of this privilege of amendment, by delaying the trials of their causes by

various artifices. To this it is answered, that the court will never suffer an amendment for the purposes of fraudulent delay.

Upon the whole, the court are of opinion, that the plaintiffs should be permitted to amend their declaration in the manner proposed, striking out those parts which relate to the penalty.

JOHN DUNLAP, plaintiff in error *against* EVAN MILES.

On a plea of *non assumpsit* to an *insimul computasset*, evidence cannot be received that the defendant entered into agreement with a third person, trusting to the accuracy of books kept by the plaintiff, in which he was mistaken.

WRIT of error to the Circuit Court of Centre county. The action was brought on an *insimul computasset*, to which there was a plea of *non assumpsit* and payment, with leave to give the special matter in evidence.

The trial was had at Bellefonte on the 16th May 1804, before Smith and Brackenridge, Justices, when a verdict was given for the plaintiff below, with 429l. 10s. 9d. damages. On the trial a bill of exceptions was sealed, the substance of which was as follows:

The defendant (below) offered under the plea of *non assumpsit*, to prove, that Evan Miles, Richard Miles, and John Dunlap, were joint partners for carrying on the manufactory of bar iron; that after the partnership had been carried on for sometime, it was agreed to dissolve the same; and J. D. agreed to purchase the interest of R. M. in the said estate, as follows:

“Memorandum of an agreement made and concluded 7th July 1797, by and between Richard Miles, of Milesburg, of the one part, and John Dunlap of Harmony Forge of the other part, witnesseth that the said R. M. doth agree to grant, bargain, sell and convey, by a general warranty deed, all his moiety or half part of Harmony Forge, premises and appurtenances thereto belonging, together with all his full moiety or half part of the stock, right and credits of or belonging to the same, unto the said J. D. for and in consideration of his paying, or securing to be paid, by bonds, and a mortgage on the premises, the several sums of money in manner and form herein after specified, viz., 2000l. advance on the price of the land, and to repay all and every the said R. M's expenditures in erecting and carrying on the said forge, with the interest on the money paid for the land by the said R. M. added thereto, from the time of purchase to the present time; and to pay Evan Miles, and wife, for their trouble, in managing the same, at the rate of \$300 per year during the time they have been there, and for the space of 3 months longer, if the said E. shall choose to stay so long, the money to be paid in manner following, viz: to E. M. for managing, 200 dollars two months

after this date, 200 dollars within six months from this date, and the residue on the 1st May next; and the money to R. M., 400 dollars on the said 1st May next, and the residue to be divided into seven equal annual payments, the first to commence on the 1st May 1799, all with lawful interest from the present date; and the said J. D. is to pay or exonerate the said R. M. from the payment of any demands, that are or shall be brought against the said forge, or partnership account whatever. In witness thereof, &c.

“ R. Miles, (L. S.)

“ J. Dunlap, (L. S.)”

That E. M. was the person who transacted the business, and kept the books of the company. That placing full confidence in the integrity and accuracy of E. M. and believing the books to present a true statement of the affairs of the company. J. D. stipulated to pay E. M. in lieu of profits, a certain allowance as manager. That E. M. after this agreement to allow his wages, in lieu of profit, made entries in the books of debts due by the company, which the defendant was obliged to pay amounting to 300*l*.

That by the said articles, J. D. stipulated to pay R. M. all the money expended by him in the concern, which appeared by the books at that time to be 1484*l*. 3*s*. 9*d*. That E. M. afterwards presented his father's accounts as from his father's books, amounting to 1972*l*. 9*s*. 4*d*. which the defendant believes he has been charged with by R. M., and that this transaction was unknown to J. D. at the time of his settlement with E. M.

This testimony was objected to on the part of the plaintiff, and the court on argument overruled the same, notice of the matter not having been given ten days before the sitting of the court, but on the morning of the trial. Whereupon, &c.

All errors apparent on the face of the account, being rectified by the direction of the court.

Thomas Smith, (L. S.)

H. H. Brackenridge, (L. S.)

Mr. Duncan for the plaintiff in error contended, that the evidence which had been offered and rejected, proved that the plaintiff below had no right to recover. Dunlap was deceived when he made his contract of July 1797, from the appearance of the books, then kept by the plaintiff in the original suit; and the latter cannot avail himself of his engagement to pay him a salary for his services, produced by his error, either accidental or intentional. On the general issue of *non assumpsit*, any thing may be given in evidence which destroys the plaintiff's right of action, 1 Wils. 45, even a release, Bull. 148

or infancy, 4 Dall. 130, though it is otherwise on the plea of *non est factum* to a deed. Gilb. Law Evid. 162.

Mr. M'Kean, for the defendant in error.

The account as appears by the record, was settled and signed 28d May 1799. It begins 7th July 1797, the day when the former partnership was dissolved, and ends on the 11th April 1799. The principal item debited is 346*l.* 17*s.* 6*d.* for the services of Evan Miles, and his wife.

Even as between partners, the nature of a demand is changed on the dissolution of the partnership, by stating and settling an account. 2 T. R. 482. Buller J. says, it is no matter how the debt arose, if there was a sum due. *Ib.* 483, (note.) Unless ten days notice is given of the special matter on which the defendant relies, he shall give no other evidence than what is by law strictly admissible on the general issue; 27th rule of practice of Circuit Court. Here notice was only given on the morning of the trial, and therefore the defendant below was not entitled to the benefit of the rule.

It is now stated, that the account was settled through the representation or deception of Evan Miles, but that Dunlap relied on his integrity and accuracy in keeping the books. Even with the notice required by the rule, the evidence would not have been admissible; because the testimony in its utmost extent, goes only to affect the articles of partnership and their dissolution, and not to discharge the promise which arose on the settlement of the subsequent account. The plaintiff below had no concern with the contracts of third persons, nor was he bound in this action to settle the matters of account between Dunlap and Richard Miles. It is *res inter alios acta*. This was an independent contract, and a new debt was thereby contracted; the evidence proposed was not relevant thereto. An *assumpsit* to do a thing may be discharged by parol, before breach; but not afterwards. 1 Mod. 206. 2 Mod. 43. Freem. 195. It was attempted on the trial to set off a cross demand for damages, for the negligence and misconduct of the plaintiff below, as the clerk of the late company, against his settled account. Unliquidated damages of such a nature have never been held a proper subject of set off.

Many inconveniences have been experienced from the practice in England, of allowing so large a range to defendants, under the general plea of *non assumpsit*. This court will not add to it, since it evidently tends to surprise and injustice. The liberty to give special

matter in evidence in this instance, not followed up by a regular notice, misled the plaintiff in the original suit.

Tilghman, C. J. Evan Miles brought an action against John Dunlap; his declaration contains a single count on an *insimul computasset*. The defendant pleaded *non-assumpsit* and payment, with leave, &c. On the trial, the defendant, not having given legal notice of any such matter, offered to give the following matter in evidence, under the plea of *non-assumpsit*. That Evan Miles, Richard Miles and John Dunlap had been partners, in carrying on the manufactory of bar iron. After the partnership had been carried on some time, it was agreed to dissolve it; and Dunlap agreed to purchase the interest of Richard Miles in the estate where the manufactory was carried on. Accordingly on the 7th July 1797, a deed was executed, to which the same Richard and John were parties, whereby the latter bound himself to pay the former a certain price for his interest in the said estate, to repay him all the money expended by him in the said concern, and to pay or exonerate him from the payment of all demands to be brought against the said partnership, and to pay Evan Miles and his wife for their trouble in managing, at the rate of \$300 a year for the time they had been engaged in the management of the business of the said partnership. That Evan Miles was the person who transacted the business, and kept the books of the partnership; and that the said John Dunlap, placing full confidence in his integrity and accuracy, and believing the books to contain a true statement of the affairs of the company, entered into the agreement above mentioned, by which Evan Miles was to have \$300 a year, in lieu of his share of the profits of the partnership; after which the said Evan made entries in the partnership books of sundry debts amounting to 300*l.*, which the defendant below was obliged to pay. That at the time of the said agreement, all the money which appeared by the books to have been expended by Richard Miles was 1414*l.* 3*s.* 9*d.*, and that Evan Miles afterwards presented his father's accounts from his father's books, amounting to 1972*l.* 9*s.* 4*d.* which Dunlap believed he had been charged with by Richard Miles; and that this transaction was unknown to him at the time, he settled the account with Evan Miles on 23d May 1799, on which this suit is brought.

It is to be observed, that although Evan Miles was no party to the agreement before mentioned, yet he adopted it by assenting to accept the \$300 a year; and this charge of \$300 a year is the principal item in the settled account, on which the suit is brought.

The Circuit Court rejected this testimony, and the then defendant took an exception to their opinion. Whether the evidence was, or was not admissible, is the point now for decision.

The courts have allowed a very large field for the admission of evidence, under the plea of *non-assumpsit*. Whatever tends to prove that at the time of the suit brought, there was no existing assumption, has been received in evidence. Accordingly, evidence has been given of the infancy of the defendant, payment, or a release. Let us consider the nature of the evidence offered by the defendant, in the case before us. He says, he entered into a contract, under an idea that the books kept by Evan Miles, contained a perfect account of the affairs of the company; but he does not say, that the said Evan ever assured him, that they contained a perfect account, or in any manner deceived him, or made a misrepresentation to him, or that the charges introduced into the account, since the agreement, are unjust. The contract was made on the 7th July 1797, and almost two years afterwards, on the 23d May 1799, he settled the account on which the suit was brought, and signed the settlement.

Whether a court of equity under such circumstances would afford relief, there is no occasion now to determine; for the point is, was the evidence admissible or not, in a court of law, under the plea of *non-assumpsit*. I am satisfied, that the matters offered in evidence did not at law affect the settled account, on which the suit is grounded, any more than they would have affected a promissory note, given for the balance of an account. If the circumstances of the case afforded ground for relief in equity, Dunlap ought to have given notice of the special matters, in consequence of which under our practice, he might have brought forward all his equity, under the plea of payment. I am not for extending the admissibility of evidence, under the plea of *non-assumpsit*. It has been carried far enough, and in my opinion, much too far already; so far as to involve plaintiffs in difficulties on trials, without any possibility of knowing the matter on which defendants rest their defence.

I am of opinion, that the evidence was properly rejected by the Circuit Court; and that the judgment be affirmed.

Yeates, J. I fully concur in the opinion which has been delivered. I have not the smallest difficulty in asserting, that on the general issue of *non-assumpsit*, the evidence offered upon the trial, could not be received at common law.

Judgment affirmed.

MATTHEW DUNCAN *et al.* executors of MARGARET DUNCAN, for the use of GEORGE FREDERICK WELPNER *against* WILLIAM WRAY.

In a suit on a bond assigned, an interposing equity between an obligee and his assignee cannot be tried, where there has been no fraud, and the debt is justly due

THIS was a motion for a rule to show cause, why the judgment entered in this cause on the 18th April 1805, should not be opened. The motion was made in December term 1805, upon which proceedings were staid in the mean time.

The facts were these : Mrs. Margaret Duncan, by her will had directed, that a store house and church should be built by her executors ; and on the 20th December 1804, Matthew Duncan, her acting executor, entered into an agreement with William Hamilton, that he should erect and finish both buildings, within one year, if the same could be conveniently done, Hamilton to furnish the materials. In consideration whereof, Duncan promised to pay him 11,400 dollars, as follows : \$500 in part of a bond of \$2000, payable on the 1st January 1806, on the 1st April then next, when the bond should be delivered up, another sum of \$2000 on the, &c. The present defendant, Wray, had executed the bond in dispute to the testatrix, on the 24th February 1801, for \$2000, payable on the 1st January 1806, with interest from 1st January 1803. Duncan paid Hamilton \$500, on the 5th February 1805, he having before on the 3d January preceding, assigned the bond informally to Hamilton, in the presence of one witness, in pursuance of the agreement, with a covenant therein to guaranty the payment thereof ; and on the 1st April 1805, Hamilton had assigned the bond to George Frederick Welpner, with like covenant of guaranty. Hamilton, in pursuance of the contract, had erected the shell of the buildings, but they were in an unfinished state and it was admitted that from his pecuniary difficulties, he was totally incapable of complying with his contract.

Mr. Chauncy in behalf of Welpner, urged that the present contest was between the nominal plaintiffs and *cestui que use* ; and the court were called upon to decide, whether the assignment was valid or not. Wray, the defendant had raised no question, but admitted that the money was justly due : he only wishes to be secure in his payment.

The executors had made an improvident contract, with a needy workman ; they had stipulated for the payment of considerable sums, before the work should be completed : they had sent the bond into market with a guaranty, which was a trap for innocent persons, who would buy the same on their credit ; the assignee had paid a valuable

consideration for it, and had nothing to do with the agreement, on which the assignment was founded. But if the court should open the judgment, what would be the result? Could the assignor raise an equity, which could be inquired into in this case? Could the jury in trial of an issue on this bond, settle the matters in dispute between Duncan and Hamilton?

The court interrupted him, and expressed their sentiments, that any supposed equity in the executors, could not be heard between the present parties, so as to prevent the assignee from receiving the debt.

They asked Mr. Ingersoll, who had made the motion, whether he knew of any case, where the court had proceeded the length to which this enquiry must necessarily lead? He answered in the negative, and declined proceeding in the argument.

Motioned denied.

Certiorari to the sessions of Delaware county, to remove all proceedings, respecting a road in Aston township, beginning at the Pennsgrove road, and thence by the house of ROBERT HILL, into the Concord road.

Court will judge of a road from the record; the sessions should confirm the road most conducive to the public good. *Semb.* that the clause in the act of 6th April 1802, that the improvements shall be noted, is only directory. Viewers returning the width of the road is only surplusage.

THERE had been four different views on this road, and four returns thereon. The sessions confirmed the third review, which did not mention the improvements through which the road passed, but fixed the breadth of the road, which was afterwards adopted by the court.

The deposition of Jonathan Dutton, proving errors in the return made by the first set of viewers, was offered in evidence, but objected to; because the court, by their 19th rule, were not to enter into the merits of the case, but to decide on the face of the proceedings. It was urged on the other side, that the courses and distances of none of the previous returns, agreed with that confirmed by the sessions.

By the court. The deposition, though taken on a cross-examination, is irrelevant to the point before us, and cannot be received. It is of no moment, whether two returns agree or not. The sessions were bound to approve such return, as would conduce most to the public good, and do the least injury to private property. The breadth returned by the last set of men, is but surplusage: the court have adopted it, by their confirmation of the

return. It does not appear to the court that the road passes through improved lands; and if it did, it is highly dubious, whether that part of the law (passed 6th April 1802. 5 St. Laws, 179. § 1.) is not merely directory, and not imperative; as has been determined in this court, with respect to surveys, where the interior lines have not been run. Noting the interferences with improvements may show to the sessions, how far the road has been prejudicial to individuals; but that knowledge may readily be obtained from other sources. There is no irregularity apparent in this record; no proof of corruption, partiality fraud or undue practice; and therefore the judgment of the Court of Quarter Sessions must be affirmed.

Messrs. J. Hemphill and Dick, opposed the road.

Mr. Frazer, *contra*.

JOSIAH W. GIBBS and Co., *against* GEORGE ALBERTI.

Court will not presume anything against the proceedings of a justice of the peace. A defendant being a freeholder, and craving stay of execution after judgment, aids an error in the service of the summons. *Semb.*

Certiorari to the administrators of Michael Hillegas, esq., deceased, late one of the aldermen of the city of Philadelphia. Diminution of the record was alleged in September term 1805.

It appeared by the record returned, that a summons issued against the defendant, dated 28th July 1804, to appear before alderman Hillegas, to answer the plaintiffs in a plea of debt not exceeding \$100, to which the constable returned, "Summons served. Left at the house of defendant with a servant. 30th July." Judgment was given by default, on the 2d August 1804, and being a freeholder, he afterwards obtained a stay of execution for nine months, the demand exceeding \$60, under the 9th section of the one hundred dollars act, which became a law on the 28th March 1804. 5 St. Laws 390.

Mr. S. Levy, for the defendant urged, that the precept had not issued in the name of the commonwealth: but on inspection of the summons, this objection appeared to be unfounded. It was served on the 30th July, to appear on the 2d August, which was not at least four days before the time of hearing, according to the 2d section of the act. It directs, that it shall issue to appear on a certain day therein to be expressed, not more than eight, nor less than five days after the date of the summons, and the service thereof, must be at least four days before the time of hearing. In *Pinchin v. Fry*, a justice's summons for a debt, under 40l., to answer on the day succeeding the date, was held

bad, and the judgment was reversed, though the debt had been settled by reference. 1 Dall. 405.

Mr. Du Ponceau, for the plaintiffs answered: that the 13th section of the law under consideration, has expressly declared, that the proceedings of a justice of peace shall not be reversed on *certiorari* for want of formality, if the precept has issued in the name of the commonwealth, and that judgment was rendered on the proper day, provided the proceedings are intelligible. A defect in process is aided by appearance. 1 Vent. 220. And one shall not assign for error, what he might have pleaded in abatement. He is estopped by his own act. Carth. 124. The defendant here is estopped by requiring a nine months stay of execution as a freeholder: and this is tantamount to an appearance, on the day required by the summons.

Mr. M. Levy replied on the part of the plaintiff. It could not possibly be intended by the legislature, that a man should be deprived of a fair hearing, under legal notice, and be remediless in a superior court. With equal propriety might it be insisted, that what the justice does, shall be conclusive, though the summons was wholly omitted to be served; for it is not mentioned as what ought to appear, by the general expressions of the 13th section relied on by the adverse counsel.

This court will proceed as upon a writ of error. The summons should appear to be served four days before the day of appearance. The constable returns it served, but further states, the manner and time of service; and it clearly appears by the indorsement on the summons, that it was not legally served. The error is visible on the record itself, without the aid of presumption. An appearance will cure error in *mesne* process, in a court of general jurisdiction; but it cannot be shown to have this effect in inferior jurisdictions. The appearance here was after final judgment, which salves no defects of *mesne* process. If he had not applied for the nine months, an execution would have issued against him at once. He was justifiable in so doing, and in taking out the *certiorari* immediately.

Tilghman, C. J. I will not presume anything against the proceedings, or that the summons was served irregularly, in order to set aside the judgment. The words "30th July," may possibly refer to the day of the return. The defendant comes before the court in a most unfavorable point of view, to obtain relief, after having already obtained a stay of execution for nine months. If the summons had not been regularly served, he might have appeared notwithstanding, and objected to

the service, which the alderman would have allowed ; and the plaintiffs would then have proceeded against him by new process.

Brackenridge, J. I think the prayer of the nine respite months before the alderman, is equivalent to an appearance on the day required by the summons, and pleading to the demand.

Yeates, J. Though I am not disposed to form presumptions against the proceedings of a justice of the peace, I cannot overlook errors. If the 30th July refers to the day of hearing, then there would be but two days between the date of the summons and its return ; if to the time of service, it was not served in due time ; so that the summons or service would be erroneous. Admitting that the defendant comes before the court with an ill grace, after obtaining a respite of nine months, could he obtain redress in any other mode than he has chosen ? Against the alderman he could have no remedy, because he was dead, and the *certiorari* was directed to his administrators. If a suit was brought against the constable, he would be told that he had made a special return, agreeably to the truth of the fact. But I submit to the opinion of the majority of the court.

Judgment affirmed.

STEPHEN SKINNER, plaintiff in error *against* JOHN ROBBSO.

Judgment cannot be arrested on matter of law in slander, after verdict, because the words were spoken after the writ issued.

WRIT of error to the Common Pleas of Franklin county.

It appeared to be an action of slander. The test of the writ was 10th April 1802, returnable on the first Monday in August following ; and the plaintiff's declaration laid the words to have been spoken on the 1st May 1802. The jury found a verdict for the plaintiff with 1200 dollars damages. By a memorandum subjoined to the record, the prothonotary certified, that the writ issued on the 22d April 1802. Reasons in arrest of judgment were filed, and the Court of Common Pleas arrested the judgment on the ground of the words spoken having been proved on the trial to have been on a day subsequent to the taking out the writ.

Mr. Duncan, for the plaintiff in error.

The court in the present state of this business cannot take judicial notice when this writ issued, nor where the words were spoken. The teste and return of the *capias*, are regularly before them ; but the

certificate of the prothonotary, though subjoined to the record, forms no part of it, nor will be received as evidence. The court will necessarily decide on the face of the record, as spread before them. As to the teste of the writ, it is mere fiction; and legal fictions will never be admitted to obstruct justice. Dougl. 108. It will not be presumed, that improper evidence was received on the trial. But if such had been offered, the defendant's counsel should have expected to it at the time; and if the court had overruled the objection, his remedy would be obvious, on a bill of exceptions. The verdict here closes all enquiry into that particular. If a declaration is drawn as of a term to which the writ issued, the day is regularly laid. An impossible day is cured by verdict. 3 Salk. 8. A verdict aids a fact alleged in the declaration on a day impossible. Blackhall v. Heal. Comy. 12. S. C. 12 Mod. 102, 105. Carth. 389. 5 Mod. 287. A demise laid as of a time not yet come, is helped by verdict. 2 Burr. 1159.

Mr. Watts, for the defendant. The words should have been proved to be spoken on such a day, as would support the suit. But a previous question demands investigation. Will a writ of error lie in this case? No judgment has been rendered here; the judgment has been arrested. No writ of error can be brought but on a judgment, or an award in nature of a judgment; for the words of the writ are, *si judicium redditum sit*, &c. Bac. Error A. 2, 463. (1st edit. 191.) I find no precedents as to the immediate point.

Mr. Duncan in reply. There is certainly a judgment here, that the defendant go without day, and that the plaintiff pay the costs. A writ of error may be sued out on a judgment of nonsuit. 1 H. Bla. 432. 1 Stra. 235. And where a defendant had moved in arrest of judgment, it was said, that until the entry is made, that judgment be arrested, the plaintiff cannot bring error. Bulling v. Rogers. 2 Barnes 226, (4th edit. 278.) Cited in 1 Crompt. Pract. 327. In 1 Days's Connect. Rep. 27, an instance occurs, of a writ of error being brought after judgment was arrested. And in Bayard v. Malcolm, 2 Johnson's New York Rep. 101, it is said, that after judgment is arrested, if the plaintiff wishes to bring a writ of error, the court will order judgment to be entered for the insufficiency of the declaration; and if the defendant's attorney does not make up the record, the plaintiff's attorney might do it. If an improper judgment has been rendered in the court below, the court here would render the proper judgment.

Tilghman, C. J. delivered the opinion of the court. It does not appear to the court upon the record when the writ issued in this action. We cannot regard the certificate of the prothonotary upon the present argument. It was incumbent on the defendant during the trial, to object to testimony of words spoken after the institution of the suit, and to have ascertained when the writ issued, as a fact. That subject is not now open to inquiry.

It is an invariable rule, with regard to arrest of judgment upon matter of law, that whatever is alleged in arrest of judgment must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea. 1 Crompt. Pract. 327. There cannot be the smallest doubt, but that this declaration, laying the speaking of the words on the 1st May 1802, would have been good; and therefore the defendant ought not to have prevailed in arrest of judgment.

It also appears from the cases cited by the plaintiff's counsel, that a writ of error will lie in a case where judgment has been arrested; and it would seem that the English practice on this head was mistaken in 2 Johnson 101.

The judgment in the Common Pleas therefore must be reversed, and judgment entered for the plaintiff.

JOHN GARDINER, jun. *against* President and Directors of the Bank of Pennsylvania, garnishees of RICHARD M. BELL.

A share of bank stock attached, cannot be transferred on a judgment in foreign attachment.

A CASE was stated for the opinion of the court, whether the defendants, as garnishees, were authorized to pay and deliver, or in any way bound, to transfer to the plaintiff upon a judgment, in a foreign attachment, the share of bank stock attached in this action?

Jonathan Smith, the cashier of the bank, had been examined upon interrogatories, and swore, that the amount of dividends due on the share was 182 dollars, for which judgment had been entered; the costs to be paid by the plaintiff.

The court inquired of the counsel, in what mode it was proposed the transfer should be made; as the presence of the stockholder, or some person constituted in his behalf for that purpose, was necessary on the occasion. They admitted that no mode had occurred to them.

This was done, and the sheriff filed the blank with the names of the jurors.

Whereupon the court denied the plaintiff's motion, and rendered judgment on the inquisition.

LESSEE of the MAYOR, ALDERMEN, and Citizens of Philadelphia *against*
THOMAS CLIFFORD and JOHN CLIFFORD.

A patent granted to the mayor, aldermen and citizens of Philadelphia, in trust, for the interment of strangers, is valid, under the act of assembly of 8th April 1786.

THIS cause was tried in Bank on the 11th December 1805, and a point was reserved therein. The counsel afterwards agreed to state the following case :

Ejectment for a certain lot or piece of ground in the city of Philadelphia, 316 feet by 396 feet.

The plaintiff's claim is founded on a patent from the Supreme Executive Council, dated 18th December 1790, reciting the act of assembly of April 8th, 1786, directing the sale of city lots, and empowering the Supreme Executive Council to reserve so many of the lots, &c. for the burial of strangers. That the council did reserve for those purposes three lots, of which the premises are one ; and they thereby grant the said three lots to the mayor, aldermen, and citizens, &c., to be used as a burial ground, &c.

The defendants objected that the above patent was void, the Supreme Executive Council having no power to convey under the act of assembly, except as to actual purchasers, and the reservation directed being to the commonwealth, and not to the city.

This point was reserved.

The defendants then showed a possession from the year 1787, of two of the three lots, and an older possession of one, by an ancient frame building. They also showed title under Francis Smith, a first purchaser, to that lot on which the frame building was erected.

A verdict was given for the defendants, as to the lot to which title under Francis Smith was shown, and for the plaintiff for the residue of the land claimed.

Messrs. E. Tilghman and Dickerson argued the case for the plaintiff. The reserved point turns on the true construction of the act of assembly of April 8th, 1786, in the proviso at the close of the 2d section. 2 St. Laws 453. The Supreme Executive Council were thereby authorized and required to reserve so many of the public lots, &c., to be appropriated as a burial ground for the interment of deceased stran-

gers, and such other persons who may not have been in communion with any religious society at the time of their decease. It has not been denied that the patent well described the use for which the three lots were intended by the law. By the act of 30th February 1730-31, sect. 2, 1 St. Laws 272, all sales, gifts or grants made of lands to any persons in trusts or scites of churches, &c. and burying grounds, are ratified and confirmed, subject to the trust.

It will not be said, that the plaintiff should suffer for want of a court of chancery in this state. If a court of equity would decree in his favor, so will this court. Charitable uses are favored, where they do not interfere with the statutes of Mortmain. If there is a power to grant for charitable uses, equity will decree the intencion, and will not regard the form of executing it. An appoinment of lands to a charity, is good without livery of seisin or attornment. 1 Equ. Cas. Abr. 97. pl. 1. A tenant in tail may devise lands to a charity, without fine or recovery. Ib. pl. 4. If lands are devised to the church wardens of a parish to a charitable use, though they are not a corporation capable of taking in succession, yet they shall be capable for this purpose. Ib. pl. 8. Equity will decree a charity, though expressed in general terms. Ambl. 422. Money given to a parish generally without saying to what use, decreed to the poor of the parish. 1 Cha. Ca. 135. One charity devised, and another decreed. 2. Cha. Ca. 19. And it has been settled, that a trustee, with the assent of *cestui que trust* or of chancery, may assign the trust to others. 2 Comy. Dig. 1st ed. 359. (Chancery, 4 W. 6.) Even a surviving trustee may grant the trust to others. 2 Vern. 748.

The only point then in dispute is, was it the meaning of the law that the Supreme Executive Council should appropriate? A patent was by no means necessary; any expression of their will would suffice. There was a specific reason, why the mayor, aldermen and citizens should be the trustees. The lot was within the jurisdiction of the city. The trust appears on the face of the patent, and no person would purchase from them. It was not the intention of the act to vest any of these lots in the commonwealth. Certain lots were to be reserved for a charitable purpose, and the council as an acting body were to appropriate. The reservation and appropriation are all parts of the same sentence.

Mr. Rawle for the defendants. It is admitted, that the patent describes the uses intended by the law for the lots to be reserved. The Supreme Executive Council were authorized to reserve the eight lots, but had no power to appropriate, or sell them, or grant a patent for them. The trust continued in the commonwealth, and they were to appropriate. By what words are the

council made trustees ? How are they to be responsible ? What remedy would the state have against them, if they sold in abuse of their trust ? The benefit was intended for strangers, not for the citizens of Philadelphia. The Supreme Executive Council could not convey to a corporation, which existed afterwards in 1789, nor is this ground within the objects of the creation of the corporation. The council are impowered to sell other city lots by express words ; and if it was intended to confer on them a power to grant a patent in the present case, it would have been so expressed. Such was the case under the 9th section of the act of 8th April 1785, 2 St. Laws 323, which considers the commonwealth as general trustees.

Tilgham, C. J. Delivered the opinion of the court as follows.

This case comes before us, on a point reserved at the trial in Bank ; and the point in the controversy turns on the construction of the act of assembly of 8th April 1786, directing the sale of city lots, &c.

The latter words of the 2d section are these :

The Supreme Executive Council are authorized to sell these lots which belong to the state ; with a *proviso* that the council shall reserve so many of the said lots, as shall be at least 200 feet and not more than 400 feet square, in such part of the city as they may judge most convenient, to be appropriated as a burial ground for the interment of deceased strangers, and such other persons as may not have been in communion with any religious society at the time of their decease.

It is confessed, that the Executive Council in the patent granted to the mayor, &c., have created a trust which exactly carries into effect the humane and liberal intention of the legislature. The only question is, whether they had a right to vest the legal estate in the city corporation for this purpose ?

This depends on the proviso above mentioned.

The council are expressly directed to reserve the lots, to be appropriated to the uses, &c. But who is to make the appropriation, the council or the legislature ? Without offending the rules of grammar, it may be construed in one way or the other.

The expression is equivocal. I therefore prefer the construction, which gives the right of appropriation to the council, because I think it most reasonable and most useful. The legislature having defined the trust, there was no reason why they should wish to retain the act of appropriation to themselves, or keep the estate vested in the commonwealth. The legislature is occupied in making laws ; the Executive Council in transacting business. The appropriation was

a mere form, attended with some trouble, and therefore most proper to be transacted by the council.

If the law gave the council the right of making the appropriation, it gave them, by necessary implication, the right of using the proper mean. No mean would be more proper, than vesting the legal estate in some persons, who would see that the intent of the legislature was performed. Who would go to the expense and trouble of inclosing the ground, and providing persons to superintend it? For this purpose, a corporation is best selected; because it is subject neither to infancy nor death: and no corporation was so proper as that of the city of Philadelphia, in which the burial place is situated.

We are therefore of opinion, that the Executive Council did no more, than by law they authorized to do, when they granted the patent to the lessors of the plaintiff; and that judgment be entered for the plaintiff, according to the verdict.

Lessee of JOHN RUGAN and JOHN CRAIN *against* RICHARD PHILIPS,
WILLIAM HAYDEN, WILLIAM WEST and ELIZABETH WEST.

Plaintiff in ejectment shall recover according to his title when suit was brought; but if pending the suit, his title is divested, he may proceed for damages and costs.

THESE were four different ejectments brought against the different defendants, to September term 1801, for four houses on the south-west corner of Dock and Walnut streets, in the city of Philadelphia. The trials were brought on, before Yeates, J. at a Court of Nisi Prius, held on 3d March last, and the following facts were admitted to the jury.

Samuel West was seized of the premises in question. On the 19th August 1800, he stopped payment, the several defendants being then tenants under him by lease.

On the 4th September 1800, he mortgaged the premises to Taylor and Newbold, to secure the payment of 10,000 dollars, and interest thereon, in the spring of 1801.

On the 12th and 19th September 1800, he committed acts of bankruptcy, and on the 25th November following, a commission of bankrupt issued, on which he was declared a bankrupt. On the 24th December 1800, an assignment of all his estate was made to the lessors of the plaintiff.

Taylor and Newbold sued out a *scire facias* on their mortgage, returnable to March term 1802, and on the 27th March obtained judgment thereon. A *levari facias* was sued out, and the premises were sold to the mortgagees, who obtained the sheriff's deed on the 12th June 1802, which was afterwards acknowledged in open court, on the 11th December following.

The question on the trial merely respected nominal damages and costs of suit, to which the lessors of the plaintiff conceived themselves entitled.

The counsel for the defendants contended, that if the plaintiff was not entitled to possession, he could recover no damages or costs. They appeared for Taylor and Newbold, who had the legal title vested in them by the mortgage, prior to the act of bankruptcy committed, and who might have supported ejectment for the possession. The estate of the lessors of the plaintiff, and the holding of the defendants, was determinable at the will of the mortgagees ; and they must be considered in the same light as if they had been made co-defendants.

E contra, it was insisted on for the plaintiff, that the mortgagees were not entitled to make themselves co-defendants, until they had pursued their legal remedy, either by ejectment or *scire facias*. But at all events, they had not made themselves co-defendants, but had continued still for more than six months after the ejectments were brought, before they proceeded by *scire facias*. Until they determined their will, the right of the mortgagor to proceed by ejectment, remained in full force, and consequently that of his assignees. If *quare ejecit infra terminum* had been brought, according to the ancient practice, the lessors of the plaintiff would have been entitled to recover damages and costs. And so here. In no case will the tenant be permitted to controvert the title of the landlord.

Yeates, J. declared, that the general rule was, that a plaintiff should recover possession in ejectment, according to his right at the time of the ejectment brought ; and he must lay his demise after his title accrued. But if he was divested of his title either by act of law, or his own act pending the suit, court would not suffer him to recover the possession adverse to the will of the party in whom the title became vested ; for this would be perverting the remedy by ejectment, and be productive of injustice. The mortgagees had not substituted themselves as co-defendants ; nor could they interfere in this business, so far as it respected nominal damages and costs.

By agreement, a verdict was taken for the plaintiff with six cents damages and six cents costs, subject to the courts opinion in Bank, whether the plaintiff could recover under the foregoing statement of facts, the damages and costs in the several suits.

Upon the case being opened in Bank, the chief justice declared, that he fully concurred in the opinion expressed at the trial ;

and that as the plaintiff was entitled at the time of the suit brought, he might under the circumstances of this case, recover his damages and costs; to which Brackenridge, J. assented. Whereupon it was agreed, that judgment should be entered for the plaintiff for damages and costs.

Messrs. Rawle and Gibson, *pro quer.*

Messrs. Ingersoll and Dallas, *pro def.*

HENRY SPARKS, jun., *against* JOHN PLANKINHORNE.

In a list of 48 names selected for a special jury, one of them appeared to be untruly described; the jury was struck *ex parte*, court refused to set aside the verdict, no merits being shown, nor defence made.

THIS suit was brought on two promissory notes payable to the plaintiff, without defalcation.

The cause was tried at Nisi Prius on the 14th March last, by special jury, when a verdict was given for the plaintiff, for 1292 dollars 70 cents, without opposition.

Mr. Rawle, for the defendant, now moved for a *venue facias de novo*, upon the affidavit of his client, that the list of 48 persons furnished for the special jury list, contained two names, "No. 7, William Pritchett, south Eighth street, merchant," and "No. 28, William Pritchard;" that no such man as William Pritchett resides in south Eighth street; but a person of that name lives in Kensington. He stated that the jury had been struck *ex parte* by the plaintiff; neither had his client attended the trial; but that under the 1st, 2d and 11th sections of the late act for selecting jurors, passed 29th March 1807, (7 St. Laws 183,) the suitors were entitled to a list of names of 48 real persons, with their places of residence; and hence there was error.

Per cur. The present motion, if successful, would be attended with extensive consequences. Every person dissatisfied with a verdict given during a fortnight at the last Court of Nisi Prius, would be entitled to a new trial. Mistakes will happen through the oversight of the commissioners and sheriff, by placing men removed out of the county, and even persons deceased, on the jury panel. But here the party did not attend to strike the jury, nor make any preparations for his defence. The case might appear under a different aspect, if it was shown that the defendant had sustained a real injury. As things are, we deny the motion.

Messrs. Ingersoll and T. Ross, *pro quer.*

Lessee of HENRY HILL *against* WILLIAM WEST, PETER THOMPSON and NICHOLAS YOUNG.

Lessee of HANNAH MOORE *against* same defendants.

After a judgment in this court removed by writ of error to the Court of Errors and Appeals and there *non prossed* upon a suggestion filed a rule will not be granted to plead thereto.

ON cases stated, after argument, judgments was rendered for the plaintiff in both causes on the 29th December 1804. Writs of error were then taken out, returnable to July term 1805, in the High Court of Errors and Appeals ; on which *non pros*'s were entered 29th December 1806, and the records remitted from thence to this court, as well for execution as otherwise.

A suggestion was now filed on the part of the defendants verified on oath, that Thompson died in 1798, and that Young died in August 1798.

A motion was now made, that the plaintiffs in both suits should plead to the suggestion.

This was objected to, on the ground that the defendants cannot assign for error matters of fact, after having assigned for error matters of law but that at all events, errors cannot be assigned, which contradict the record.

Messrs. Ingersoll and Dallas, for the defendants now urged, that the writs of error had been taken out improvidently, and had been *non prossed* by themselves. They labored under a technical difficulty, that cases only had been stated, and it had not been agreed, that they should be considered as special verdicts. In England, motions are now daily adopted to redress the party supposed to be injured, instead of proceeding by the ancient form of writs of *audita querela*. If no relief can be obtained here, the party is without remedy. Justice required, that the matter suggested should be examined into. We can find no precedent of a writ of error in Pennsylvania, returnable *coram nobis*. In *Silver v. Shelback*, 1 Dall. 165, a writ of error was brought to reverse a judgment in C. B. of the county of Philadelphia, wherein infancy was assigned for error, the defendant below having appeared in his proper person ; and the opinion of the court, as delivered by M'Kean, C. J., was, that the fact of infancy must be tried *per pais*. 1 Dall. 165, 166. In *Palmer, pltf. in error v. Sparkes*, in the High Court of Errors and Appeals on the 15th July 1801, Mr. President Chew said this court cannot try a matter of fact ;

but Shippen, C. J. remarked, we do not say, there can be no case where- in the Court of Errors and Appeals cannot try a question of fact. In *Crawford v. Wiling et al*, the jury found the principal sum, but submitted the point of interest to the court, and a suggestion was filed by consent.

Mr. E. Tilghman, for the plaintiffs. It is directed, that the record and proceedings shall be remitted by the High Court of Errors and Appeals into the Supreme Court, on the affirmance or reversal of judgments. 3 Dall. St. Laws 97. § 17. In *Crawford v. Wiling et al*, the issue was formed by consent, and therefore can form no precedent.

The action was in account render. How comes it, that in *Palmer plaintiff in error v. Sparkes*, the ingenious counsel did not adopt the plan of a suggestion, as has now been devised? But we live in an age of novelty! There is no reason why a writ of error *coram nobis* may not issue in this case, if the party can derive any benefit therefrom.

By the Court. We do not feel ourselves authorized to grant a rule to plead on this suggestion. The path is untrodden; the practice perfectly novel. The parties have no day in court after judgment. If the defendants here have a legal remedy by writ of error or otherwise, they have it in their power to pursue it; but we give no opinion whatever upon it. We are not disposed to follow a method, which has never been adopted either in England or this government within our knowledge.

Motion denied.

MARY PEART *against* STEPHEN PHIPPS.

Where there is a covenant on the part of the grantees to pay the ground rent free and clear of all assessments, they are not allowed to deduct the same from the rents due to the ground landlord.

The following case was stated, as of March term 1802, for the opinion of the court.

The plaintiff by indenture dated 25th October 1773, granted and conveyed to the defendant, a certain lot of ground, situate on Sassafras street, between 5th and 6th streets, in the city of Philadelphia, in fee simple, reserving a rent of 13l. 10s. payable to the plaintiff, her heirs or assigns, on the 1st day of April annually for ever. And the said defendant for himself, his heirs, executors, administrators and assigns, did covenant, promise, grant and agree to, and with the said plaintiff her heirs and assigns, that he, the said defendant, his heirs and assigns, should and would from time to time, and at all times thereafter,

truly pay or cause to be paid unto the said plaintiff, her heirs and assigns, the said yearly rent thereby reserved on the day and time therein before appointed for the payment thereof, clear of all charges and assessments whatsoever, and under the proportionable part of the yearly quit rent accruing for the thereby granted premises to the chief lord or lords of the fee.

The defendant by virtue of the deed aforesaid, entered into the premises aforesaid, and was and is still seized thereof. Subsequent to the date of the said indenture, sundry taxes have been levied and assessed, as well on the ground rent reserved as aforesaid, as upon the ground itself; all of which the said defendant has paid, and claims a right to deduct those assessed upon the ground rent and which he has paid, from the arrears of rent claimed by the plaintiff; to which the plaintiff objects, contending that she has a right to receive the said rent annually, free from the same taxes and all charges whatsoever. It is agreed, that at the time of executing the said deed, ground rents were not a distinct subject of taxation.

The question submitted to the court, was, whether the defendant was entitled to make the deduction claimed by him?

The case was argued on the 22d December 1803, by Mr. Gibson for the plaintiff, and Mr. Rawle for the defendant. The following cases were relied on by the former, to prove that the ground landlord was exempted from taxation, by the terms of the covenant. Doug. 602, 624. 1 Salk. 198. 2 Salk. 615. 1 Ld. Ray. 818. 12 Mod. 166. Comb. 424. 466. 5 Mod. 368. It was said on both sides, that an usage had obtained with respect to the payment on taxes, on ground rents, where covenants had been inserted in the deeds, and similar to the case before the court, but they disagreed in their statement of this usage; whereupon the court recommended that the same should be ascertained by the verdict of the jury, which was mutually agreed to after this method was adopted, the defendant died and Thomas Phipps and Benjamin Kite, his executors, were substituted as parties to the suit.

The cause came on to trial at a court of Nisi Prius on the 23d February last, on a declaration in covenant for non-payment of the rent charge; to which the defendants pleaded covenants performed, with leave to give the special matter in evidence, without prejudice to the question of law. Several witnesses were examined, to ascertain what had been the practice as to the payment of taxes on ground rents, subsequent to their becoming distinct subjects of taxation (which was said to be in 1779) on deeds previously granted, with covenants that the grantees should pay the same clear of all assessments and charges;

but the instances of payment by the grantees were equal to those of payment by the ground landlords, and the matter was left in equilibrio. The jurors were hereupon discharged by consent, and it was agreed, that the decision of the court should be given on the case before stated.

The case being afterwards called up in Bank, Mr. Rawle declared that he could not contend the legal question in behalf of the executors defendants, independently of the usage of which they had failed in the proof; and agreed that judgment should be entered for the plaintiff, on the case stated.

Judgment for the plaintiff.

SAMUEL POTTER, WILLIAM PAGE and THOMAS PRICE *against* JOHN NORMAN and JOSEPH NORMAN.

One in custody under a ca. sa. gave bond with security to comply with the requisites of the insolvent law of 4th April 1798. Having petitioned and being opposed by his creditors, proceedings were stayed until the next August term, and a new bond given. At the August term, it was objected that he had not filed an inventory of his debts and credits with his petition, but the case was continued under advisement, and he did not surrender himself. In November term the court discharged the petition on account of irregularity; adjudged that the second bond was forfeited.

CASE stated.

The argument in this cause having been resumed on the 24th March 1807, the counsel disagreed, as to the fact of a new petition having been presented to the Court of Common Pleas of Montgomery county, in August term 1800; and as it did not appear by the case stated, how that fact really was, it was proposed to ascertain it, and amend the state of the case accordingly. But the counsel not having come to any agreement as to the point to be ascertained, the argument was renewed two days afterwards.

The arguments were substantially the same as in March term 1802; but the counsel for the plaintiffs made another point, that a new petition not having been exhibited in August term 1800, the bond certainly became forfeited. The only petition stated in the case was that preferred in May term 1800, and the proceedings were stayed in June until August term following, when the petition was moved to be discharged on the part of the creditors. But the petition antecedently filed could not with propriety be acted upon. The act of the 4th April 1798, (4 St. Laws 269,) refers in clear terms to a petition filed subsequent to the giving of the bond.

To this the defendant's counsel made no other answer, than that the case through oversight had not been fully stated. The fact was, that the first bond was utterly void by not pursuing the words of the act, and hence it was agreed that a new bond should be given to supply the

defects of the former. The argument before did not proceed on the ground of a new petition, not being filed, but that the debtor did not surrender himself in August term 1800, or give a new bond.

The court declared, that the invalidity of the first bond formed no part of the case as stated, and to which the court were confined.

The opinions of the judges were afterwards delivered in substance as follows.

Tilghman, C. J. I have felt considerable difficulty in deciding this case. I believe however, that difficulty has arisen, not so much from intricacy of the question, as from my desire to relieve the defendants from what I consider as a hardship. But the bond is too strong to be got over. The defendant, John Norman, was arrested on a *ca. sa.* in the vacation. His case falls within the 14 section of the insolvent law of 4th April 1798.

The condition of the bond is nearly in the words of the act of assembly. It is, "that he shall appear at the next county court and surrender himself to prison, in case he does not comply with the act of assembly."

The words of the act are, "that he shall appear and surrender himself in prison, in case on his said appearance, he does not comply with all things required by this act to procure his discharge." They are in substance not different; and no doubt the bond was intended to be in pursuance of the act of assembly. Before the bond was given, the plaintiff had an interest in John Norman's imprisonment. It was the only means he had of procuring satisfaction for his debt. On John Norman's being liberated, when he gave the bond, the plaintiff had an interest in his honest and faithful compliance with the insolvent law; he had a right to expect an account of his property and a surrender of it, and unless he took the first step pointed out by the law at the court ensuing the date of the bond, which was to exhibit a petition, with a schedule annexed to it, containing an account on oath of all his property, he was obliged both by the words and spirit of the law to surrender himself to prison. The case stated does not say whether he filed a new petition at August Term. We cannot say that he did, because that fact is not stated. But whether he did or not, it is clear that he failed in complying with a material part of his duty, viz. giving an account of his property on oath. The court did not hinder him from complying with the law. They continued the matter under advisement, and at length determined, that the law had not been complied with. John Norman might very easily have filed a new petition at the August term, to remove the objection made by his creditors; or

he might have surrendered himself to prison, till the point was decided. But by remaining out of prison, he acted at his own peril, and incurred a forfeiture of the bond, unless the court should determine that his petition was regular. I am of opinion, that the bond was forfeited, and that judgment be entered for the plaintiff.

Yeates, J. When this case was argued before the court in March term 1802, the plaintiff's counsel insisted that the bond of 20th June 1798, was forfeited, by reason of John Norman's not complying with the requisites of the act of 4th April 1798, by surrendering himself to prison at the August term following, when he did not procure himself to be discharged. The want of a petition in pursuance of his bond, was not then contended for as any ground of forfeiture. I concurred at that time in opinion with the then chief justice, and can yet see no reason for altering that opinion, that the bond was not forfeited on the ground insisted upon.

It must be admitted, that the intentions of the legislature in enacting the law under consideration, pursued the spirit of the constitution, and were very humane. The title of the act and all its provisions fully evince this. With the policy of the law, and particularly of the 14th section, I have nothing to do. I would reluctantly strain any of the words, either to impute a *mala fides* to an unfortunate debtor, or to charge his bail. The essence of the bond given with security by the debtor in vacation, I take to be his personal appearance at the next term, to prosecute with good faith his discharge under the act. But nevertheless, if it could be fairly collected from the case, that the application was merely evasive and illusory, and that it did not proceed on an honest intention of enlargement of the debtor under the true spirit of the law, I would visit the sin of the principal upon the security, and hold him answerable to the creditor. It has been asked, why a debtor in execution, with friends who will give bail for his appearance, should be in a better situation than one who has it not in his power to give security while the application is under consideration? I answer, the line of distinction has been drawn by the sovereign will of the community by which we are bound. If the court had in the August term decided, that the petition "containing no just and true account of his debts, credits and estate real and personal," was irregular and could not be received, John Norman might have petitioned *de novo*, rectifying the former error. But the matter was postponed by the act of the court, and their power in this particular cannot be questioned. Until their de-

on had been made on the motion of the creditors, I do not conceive that the debtor was bound to surrender himself.

A new point has been made during the present argument, that the bond was forfeited, by not filing a new petition in pursuance thereof. The case is not fully stated. Whether the new bond was taken in consequence of an application to any judge of this court, or of the Common Pleas in vacation, does not appear; nor how the new bond came to be executed; except that it is stated to have been entered into by agreement with the plaintiffs at that time. It certainly is not stated, that the plaintiffs by any act or agreement on their part, dispensed with the necessity of a petition; and we must decide on the statement as made. Nothing is said of the filing of any other petition, than that in May term 1800; and what is mentioned of the motion of the creditors to discharge the petition, can only refer by the fair rules of construction and common grammar to the petition filed, when he was first committed to the prison of Montgomery county. The validity of the bond is admitted by the case.

The 14th section of the act refers to the 1st and 2d sections, as to the mode of application by insolvent debtors; and the primary step prescribed thereby is a petition to the judges of the court, offering to deliver up to the use of his creditors all his property. Such petition is the *sine qua non* the court can proceed; and without it we cannot perceive any honest intention in the debtor of complying with the requisites of the law. On the ground of no petition being filed, agreeably to the tenor of the bond, I am of opinion, the same became forfeited, and that judgment be rendered for the plaintiffs, however hard the case may be. At the same time, for my own part, I must be permitted to express my regret, if the want of a full statement has prevented us from an inquiry into the true merits of the case.

Brackenridge, J. The act of assembly of 4th April 1798, prescribes a mode for the enlargement of debtors arrested in execution, by giving a bond to appear and comply with all the requisites of the act. A statement of his debts and credits under oath is a material requisite. A compliance with the requisites, or a surrender into custody, can alone save the bond. The court held the matter under advisement in this instance; but the debtor might have gone to prison, or given a new bond with the leave of the court.

The situation of the debtor under this act is different from debtors in custody. His liberty is at the expense of the creditor, who loses the hold of him by imprisonment to bring the debtor to a surrender. The creditor, on forfeiture of the bond, has an interest vested in him to compel the payment of his debt. That ought to be paid before re-

lief from the bond ; because the very circumstance of the three months liberty, which he has gained by evasion, may be the very means of depriving the creditor of his debt. The common law analogy of relief on bail bonds, does not in reason or justice apply to such a case.

I had no doubt whatever on the former argument, when Judge Smith and I were of opinion that the bond was forfeited. I have no doubt now, when the case has been more fully argued.

Judgment for the plaintiffs.

Certiorari to the Sessions of Montgomery County, to remove all proceedings respecting a Road in Hatfield Township, leading from Myer's Road to Allentown Road.

No proceedings can be pursued under a repealed statute, though begun before the repeal, unless by a special clause in the repealing act.

Therefore, under the act of 6th April 1802, respecting roads, proceedings under former laws thereby repealed, cannot be continued.

It appeared by the record, that in May sessions 1801, the original petition had been presented for the road, upon which viewers were appointed. In August 1801, the viewers reported a public road by courses and distances, which was confirmed *nisi*; but on a petition for a review, reviewers were appointed. In November 1801, the reviewers reported, that they had viewed and agreed to the former return, but a petition was presented to quash their proceedings. In February 1802, the report of the reviewers was quashed for irregularity in not giving notice, and other reviewers were appointed. In May 1802, the second reviewers reported, that they had viewed, and found no road there to be necessary; but on a petition for a re-review, the same was granted. In August 1802, the re-reviewers reported, that they had viewed the track of the road as formerly surveyed, and had heard the parties for and against it, and were of opinion, that there ought to be a public road there 33 feet wide, and recommended the same, which said road was then confirmed by the sessions.

The following exceptions were filed against the road :

1st. No place of beginning and ending was designated in the original petition and order.

2d. The first return does not accurately fix the beginning.

3d. No power was given to the reviewers to vacate the first return.

4th. No courses and distances are inserted in the last return.

5th. The width of the road was not directed by the court.

6th. No draft or plot accompanied any of the returns.

7th. The proceedings were under the former laws, and no

provision is made by the act of 6th April 1802, to continue proceedings under the old laws.

The case was argued on the 13th September 1804, by Messrs. Rawle and Milnor, in support of the road, and by Messrs. T. Ross and Frazer, against it; but the court being then equally divided, no judgment was given. The argument was resumed on the 25th March 1807, by the same counsel.

The counsel for the reversal of the order of sessions, relied upon the 4th 6th and 7th exceptions, and withdrew the others. They insisted, that the full extent of the 4th and 6th exceptions, was warranted both by the spirit and letter of the act of 6th April 1802. 5 St Laws 178. Under the 1st section it is directed, that the report of the road, whether public or private, shall state the courses and distances, together with a plot or draft thereof. But here there are plain defects in all these particulars; nor is there any sufficient reference to a survey, or other certainty.

The 25th section of the act repeals all laws theretofore enacted for the laying out, opening, making, amending or repairing of public or private roads. It was in operation in May sessions 1802, when the second set of reviewers made a return, and when the court appointed re-reviewers. But the sessions proceeded under the old laws, as if they were in full force. This was illegal; and whatever may be conjectured of the intention of the law makers, there is certainly no special clause, enabling the sessions to continue the proceedings under former acts, after the repeal. This appears to be necessary by 1 H. H. P. C. 291. And Miller's case in 1 Bla. Rep. 451, is very analogous to the present. It was there determined, that no proceedings can be pursued under a repealed statute, though begun before the repeal, unless by a special clause in the repealing act. Indeed the rule has been laid down, that where one statute is repealed by another, the acts done, in the mean time are valid, but not if a statute be declared null. Jenk. Cent. 233, pl. 6. The words of the law here are, that the former acts are repealed and made void. In the case of the United States v. Thomas Passmore, Judge Washington held, that he could not be proceeded against for perjury under the bankrupt law, after it was repealed; though the offence was committed while that act was in full force.

It cannot be said, that any civil right attached here, until the road was confirmed by the sessions.

In support of the road, it was answered, thrt the court in judging on the returns of roads not be critically nice. Even verdicts will be worked into form, where the intent of the jury is manifest and plain.

2 Burr. 699, 700. 1 Dall. 462. The return of the re-reviewers evidently refers to the return on the view, which specified the courses and distances of the road. In August 1801, no draft was necessary on the return of a road by viewers; and under the late act there is no necessity for such a draft on a report of reviewers. The 22d section of the act impowers the court to grant a review at the expense of the parties applying; and it pursues many of the provisions made by the former road laws. The 2d and 19th sections in particular contain references of this kind. Besides, may it not be said, as was insinuated by the chief justice during this term, in the case of the Aston township, Delaware road, that the clause, respecting the plot of the road equally with the improvements interfered with, is barely directory and not imperative. Whether the tract of a road is strait or crooked, may be judged of by the courses and distances, as well as by inspection of the draft; though it may not be so obvious immediately to the eye.

The new act undoubtedly repeals the ancient laws upon this subject *quodam modo*; but it by no means vacates all proceedings had under them, upon which the sessions had made no final order. Here had been a view and review and new reviewers were appointed before the law passed. The adversaries of the road, by the return of their reviewers to May sessions 1802, admit the jurisdiction of the sessions as to unfinished business, begun on the former institutions. In Passmore's case cited on the other side, Judge Washington laid down the rule, that civil rights vested under a law before it was repealed, could not possibly be affected by its repeal. Here the report on the first view was confirmed *nisi*, under which a right attached in the petitioners, who applied for the road. In Miller's case cited, the jurisdiction was wholly gone. The observation in Jenkin's cannot be sound law, if it meant thereby, that upon a statute being declared null and void, all acts done in pursuance of it, are thereby avoided. It would be repugnant to reason and common sense. Adopt the rule laid down in Plowd. 467, and suppose the law makers present, and that they were asked the question, whether they intended, when they enacted the law of 6th April 1802, to nullify thereby all proceedings under the former acts, to whatever extent they had gone, before final sentence thereon? Would they not answer at once? God forbid! Such an idea never entered our minds!

Tilghman, C. J. I shall give my opinion on one point only; because it will decide this cause. I mean on the 7th exception; which is, that all former road laws having been repealed by the 25th section of the act of 6th April 1802, the court of Montgo-

mery county had no authority to continue the proceedings, which were instituted prior to the passing of that act.

The authority to lay out roads is not naturally incident to courts of justice, and was therefore vested in them by particular acts of assembly. If the laws vesting this authority had been repealed, and the power had been given to another body, it would have been clear, that the courts would have been ousted as to all further proceedings, on unfinished business relating to roads. But the repeal of all former laws must have the same effect on unfinished business, whether the authority under the new system is vested in the same court, or in a different body. The repealing clause in this act of assembly is as comprehensive as possible. "All laws heretofore enacted, for the laying out, opening, making, amending or repairing public or private roads or highways, &c. are hereby repealed and made void."

I agree with Judge Washington, in the principle said to be laid down in Passmore's case; that all civil rights vested during the continuance of a statute, shall remain, after the statute is repealed. But here was no vested right. A petition had been presented for a road. Proceedings were had upon it; but before the court made a decision, the law under which they derived their authority was repealed. I do not suppose, that the legislature intended to produce this consequence. I have no doubt, but it was an oversight in drawing the repealing clause; but we have no power to supply omissions.

I am of opinion, that the proceedings of the court of Montgomery county were irregular, and that they may be reversed.

Yeates, J. We are not at liberty to indulge ourselves in conjectures, what was the intention of the legislature, in the repealing section under consideration. We are bound to collect their meaning from the words they have made use of, by certain settled known rules of construction. Miller's case, cited from 1 Bla. Rep. 451, seems to me strongly in point. There the jurisdiction had attached in the justices, under the insolvent debtor's act of 1 Geo. 3. He was compelled to give up his effects, and he signed and swore to a schedule; but his discharge was adjourned till the next sessions. The compelling clause was repealed in the succeeding year: and the Court of King's Bench say, nothing is more clear, than that the jurisdiction is now gone. The rule is perfectly well settled, that offences committed against a statute while in force, cannot be punished after the statute is repealed, without a special clause for that purpose, in the latter statute. I concur in the reversal of the order of the sessions.

Brackenridge, J. I was of opinion at the last argument, that

the act of assembly of 6th April 1802, continued the proceedings begun under the former laws : I cannot suppose that the legislature intended to annul the proceedings, which had taken place under existing laws. I rather doubt at present : but I am strongly disposed to affirm the order of sessions confirming the road.

Order of the sessions reversed.

GEORGE FREY *against* ROSEWELL WELLS, *et al.* executors of BENJAMIN HARVEY deceased.

The certificate of a judge authenticating a judgment in another state, needs no stamp under the act of congress of 9th July 1797, and should be read in evidence.

WRIT of error to the Common Pleas of Luzerne county.

It appeared by the record, that the suit was brought to November term 1797. The declaration was in debt for 381l. 2s. 11d. money of Pennsylvania, recovered in March term 1775, at Litchfield county in the state of Connecticut, as by the record, &c. appears.

The defendants appeared, prayedoyer of the writ and record, and special imparlance : in November term 1798, they pleaded *nul tiel* record, with leave to alter ; and in April term 1801, the plaintiff replied *habetur tale recordum*, and issue was joined.

The cause came to trial in the Court of Common Pleas, before Jacob Rush, esq. president, and the other judges, on the 22d April 1802, when the plaintiff produced in evidence in support of his declaration, a certain paper, purporting to be an exemplification of the record of the judgment obtained in the Court Common Pleas of Litchfield county, *prout patet* the exemplification of the record aforesaid ; which paper was overruled by the court, whereupon judgment was given *quod non habetur tale recordum*.

The exemplification by the clerk of the court, was dated February 2d, 1797 ; and the certificate of Joshua Porter, esq. C. J. of the Court of Common Pleas of Litchfield county, (under the act of congress of 26 May 1790. 1 U. S. Laws 115.) that the attestation was in due form, was dated November 15th 1799.

General errors being assigned, the defendants pleaded in *nulloest erratum*. The cause was argued on the 18th December 1806, by Mr. Duncan for the plaintiff in error, and by Mr. Condry for the defendants ; and during the present term by the same counsel, on the 26th March.

For the plaintiff it was contended, that there had been error on two grounds. 1st. That the issue had been tried by the court

and not by the jury. And that 2dly. The court illegally refused the record in evidence.

In trials by the record, the party pleading the record has a day given him to bring it in ; and if it be pleaded, that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but by itself. 3 Bla. Com. 331. The record here being of Connecticut before the revolution in 1775, ought to have been tried by a jury.

The defendant's counsel answered, that on the record being brought in, it could only be judged of by the court. *Nil debet* is no plea to an action of debt founded on a judgment in the state of New Jersey ; because a debt cannot be denied, without denying the instrument on which it is founded. *Armstrong v. Carson's executors.* 2 Dall. 302. It is true, that in *Benjamin Rush v. William Cobbet*, on a suit brought upon a judgment obtained in this court, the court in New York were of opinion that the judgment in Pennsylvania was not conclusive ; but the judges were not unanimous. The effect of records certified and authenticated according to the provisions of the act of congress of 26th May 1790, 1 U. S. Laws 115, is the same, as in the courts of the state from whence the record is taken.

The court desire the counsel to confine themselves to the point, whether the exemplification offered was good evidence of the record.

For the defendants. The declaration states a judgment at Litchfield county, in the state of Connecticut ; but the paper offered was of a judgment of Litchfield county, in the colony of Connecticut ; and here is a variance between the *allegata* and *probata*. But a more substantial objection is, that the exemplification was not stamped according to the provisions of the act of congress of 6th July 1797, 1 U. S. Laws 20, "laying duties on stamped vellum, parchment, and paper." By sec. 1, any exemplification, of what nature soever, that shall pass the seal of any court," other, &c. is subjected to a duty of 50 cents ; and by sec. 13, "no such deed, instrument or writing, shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity, until it shall be stamped as aforesaid." The act of 26th May 1790, requires the attestation of the clerk, and the certificate of the judge, &c. that the attestation is in due form. Both must concur to render it a complete exemplification, to produce the effect required by the law of the union. But the judges's certificate given on the 15th November 1799, when the stamp act was in full operation, was in point

of law of no avail, being unstamped, and a fraud on the people of the United States.

For the plaintiff in error. There is no force in the objection, that Connecticut is called a state in the declaration. It was formerly a colony, but by the adoption of the union became a state.

Under the act of congress of 6th July 1797, in the beginning thereof, the stamp duties were to be collected and paid from and after the 31st December then next ; but by a subsequent act of December 15, 1797, the time was postponed until after June 30, 1798, and the duties were not to commence sooner. 1 U. S. Laws 51. At the time of the proferit therefore, in November term 1797, the stamp duties were not in operation, and the 50 cents could not possibly be paid. The act lays a duty "on any exemplification under the seal of the court," which can only refer to the ministerial act of the clerk. The certificate of the judge authenticates the exemplification, but is no part thereof, nor is it required to be stamped. It may be superadded at any time, when it is required for purposes beyond the bounds of the state where the judgment was given. There can be no hesitation in saying, that in any court of Connecticut, the exemplification under the seal of the court, certified by the clerk, would have been received in evidence, without having the certificate of any judge annexed thereto.

The opinion of the court was delivered as follows by Tilghman, C. J. The exemplification of the record was good evidence, and showed the same debt which the plaintiff declared on, and the judgment upon which issue was joined. The exemplification and certificate are different things. If the stamp act bears on the case, the exemplification would be no evidence even in Connecticut. Now, in Connecticut, no certificate of a judge is necessary ; and therefore no argument founded on the date of that certificate could have any weight there ; consequently, the exemplification being evidence in some courts, cannot be affected by the provisions of the stamp act.

Judgment reversed.

[Afterwards record remitted.]

RESPUBLICA *against* WILLIAM M'CLEAN, esq.

A justice of the peace commissioned within a certain district and county, cannot act under his former appointment upon a division of the county, if he shall reside in the new county, tho' the district remains in it entire.

This was a motion, calling on the defendant to show cause, why an information in the nature of *quo warranto*, should not be filed against him, for exercising the office of a justice of the peace in the county of Adams.

It was admitted, that William M'CLean was, on the 29th August 1791, duly appointed and commissioned to be a justice of the peace, in the district of Hamilton's Bann, in the county of York. That on the 22d January 1800, the said county of York was divided by the legislature, and part thereof erected into a separate county called Adams. That the said township of Hamilton's Bann lies now in Adams county; and that the district now in the county of Adams, consists of the township of Hamilton's Bann, Franklin and Liberty, according to its former boundaries; and that the said William M'CLean has continued, and still does continue, to reside in the said township of Hamilton's Bann, now in the county of Adams, and hath therein exercised the office of a justice of the peace since the division of York county aforesaid.

The motion to show cause was made on the 1st January 1802, and then argued by Mr. M'Kean on the part of the commonwealth, and by Mr. Duncan on behalf of the defendant. The court continued the matter under advisement, and after consideration, the court were divided in their opinions, Shippen, C. J. and Brackenridge, J. being in favor of the motion, but Yeates and Smith, Justices, in opposition to it. No opinions were then publicly delivered. During the present term, on the 23d March, the motion was again argued by the same counsel (in the absence of Smith, J. who was confined to his chamber by sickness) substantially as before.

It is deemed unnecessary to specify their arguments, as they are fully detailed in the opinions of the justices, who afterwards on the 28th March, at the close of the term, delivered their opinions *seriatim*.

Tilghman, C. J. The question for the court's decision is whether William M'CLean can lawfully exercise the office of a justice of the peace for the county of Adams? The facts, out of which the question arises, have been stated.

By the 10th sec. of the 5th article of the constitution of Pennsylvania, "the governor shall appoint a competent number of justices of the peace, in such convenient districts in each county, as are or

shall be directed by law. They shall be commissioned during good behaviour."

By the 8th section of the 2d article of the constitution, "no person shall be appointed to an office within any county, who shall not have been a citizen and inhabitant thereof, one year next before his appointment if the county shall have been so long erected; but if it shall not have been so long erected, then within the limits of the county or counties, out of which it shall have been taken."

There is no express provision in the constitution, that county officers shall continue to reside within their respective counties; but it has always been understood, that if an officer removes out of the county, for which he was appointed, his office becomes void.

It is necessary in the first place to consider what was the extent of Mr. M'Clean's jurisdiction at the time of the division of York county. He was commissioned as a justice of the peace, in the district of Hamilton's Bann; yet his jurisdiction was not confined to that district, but extended through the county of York. If that county had been increased or diminished, his jurisdiction would have increased or diminished accordingly. This I think, is universally agreed.

It is also agreed, that those justices who were commissioned before the division of York county, and who fell within that part which is still called York, are limited in their jurisdiction to the present county of York. It follows therefore, that the county is a very essential part of the commission of a justice of the peace. When the present constitution was framed, it was well understood, that the power of altering the bounds of counties, had always been exercised by the legislature, and that it was necessary that power should continue. It was understood too, that certain consequences necessarily flowed from the alteration of counties. In construing the constitution therefore, we must take care not to destroy those implied powers, without which society could not exist.

The legislature, in pursuance of their knowledge power divided the county of York. The consequence was, that Mr. M'Clean ceased to belong to the county of York; his actual residence was in another county; he no longer answers the description of his commission, which is for the county of York. It is true, he still lives in the same district, but that district never bounded his jurisdiction; it only marked his residence. This cause must be decided on general principles. The same law that governs Mr. M'Clean's case, must govern the case of every other justice, who lives in a newly erected county. Now to make the matter more plain, let us suppose a county newly

erected out of two or three old counties, as was the case of Centre county, (which was composed of parts of four old counties,) I ask, what would be the jurisdiction of a justice, who belonged to one of the old counties, of which Centre is composed? Would his process run throughout the county of Centre? That is impossible, for he never was commissioned for Centre, nor for either of the sections of the old counties composing Centre, except that in which he resides. Shall he be restrained to that section of the old county, for which he was commissioned, which falls within Centre? That is a kind of jurisdiction unknown to the law, and which I believe is not contended for. I know of no way of avoiding these difficulties, but by adopting the plain principle, that his commission has necessarily become void, by the political annihilation of that part of the county, for which he was commissioned, and in which he resides. Mr. M'Clellan was commissioned for the county of York; but he resides in the county of York no more.

I should feel greater difficulty in this case if it was entirely new. But it appears to me, that the principle which must decide it, has frequently occurred, and been acted upon for twenty years before the division of York county.

By the 30th section of the frame of government of the constitution made in 1776, justices of the peace were elected by the freeholders of each city and county; that is to say, two or more might be chosen for each ward, township or district, as the law should thereafter direct, of whom the Supreme Executive Council should commission one or more for each ward, township or district for seven years, removeable for misconduct by the general assembly. Now those justices had as absolute an interest in their offices, during the seven years for which they were commissioned, as the present justices have during their lives. The first new county erected after the making of this constitution, was Washington, which was carved out of Westmoreland, and the act for its erection (passed 28th March 1781) provided that the freeholders of each township or district should elect two fit persons for justices of the peace for each township; which would have been improper, if any of the old justices had been authorized to act under their commissions. From that time to the year 1790, when the present constitution was adopted, many new counties were erected; and it will appear from the several acts of assembly erecting them, that it was taken for granted, that all authority of county officers, including justices of the peace, ceased in the new counties, immediately on their erection, unless it was otherwise provided by law. Since the adoption of the present state constitution, the acts of assembly for erecting the counties

of Somerset, Greene and Wayne, contain provisions respecting justices of the peace, incompatible with the idea of their having any authority by virtue of commissions granted before the erection of those counties. It is true that a legislative construction of the constitution is not binding on courts of justice. It has been so decided, and is understood to be the settled law. But at the same time, it cannot be denied, but that a legislative construction, uninfluenced by party spirit, introduced soon after the the making of a constitution, and frequently carried into effect without opposition for the course of twenty years, is entitled to very considerable weight. The public happiness requires that it should have weight.

But it has been strongly urged by the counsel for Mr. M'Clean, that the legislature having no right to annul by a direct act, the commissions of officers who held during good behaviour, cannot do it indirectly, and that the most pernicious consequences may flow from the exercise of this power for party purposes. In answer to this, it may be said, that if the legislature was to make a division of a county for no other purpose than barely to deprive justices of the peace of their commissions, it would be a case very different from that which comes before the court, and concerning which it would be imprudent to deliver an unnecessary opinion. It is not pretended that the county of York was divided for any such purpose. The question is, whether from an act of the legislature within their acknowledged powers, the destruction of Mr. M'Clean's commission does not necessarily follow? I will add, that the possible abuse of any given power, is no argument against the right to exercise it. The same argument would take from the legislature, the rights of taxation, and innumerable other useful powers, which by supposing extreme cases, might be exercised to the ruin of the community.

Upon the whole I am of opinion, that upon a fair construction of the constitution, the tenure of a justice of the peace during good behaviour is subject to the implied condition of his remaining in the county named in his commission. But while I deliver this opinion, it would be unbecoming in me to say, that the question is without difficulty. I shall always feel diffidence, when this bench is divided. It is proper to mention, that on the former argument, while I was at the bar, I understand, that the late chief justice Mr. Shippen, was of the same opinion which I now hold, and Judge Smith was against it; and I have no reason to suppose, that Judge Smith, whose absence is occasioned by sickness, has changed his opinion.

Yeates, J. The abstract question before the court is, whether

after a person had been duly commissioned as a justice of the peace, in a certain district and county, and has constantly resided, and still continues to reside in the same district, his commission is determined by such county being divided, and a new county struck off, into which the district falls?

By the 30th section of the first state constitution of 28th September 1776, justices of the peace shall be elected by the freeholders of each county, two or more persons for each township or district, as the law should thereafter direct, and their names shall be returned to the president in council, who shall commissionate one or more of them for each township or district so returning, for seven years, removeable for misconduct by the general assembly.

Under the act of 5th February 1777, the different counties were divided into a certain number of districts; and the commissioners and assessors of each county were directed to meet on an appointed day and make such division; and after ten days notice of the time and place of election, the freeholders of each district were to elect two fit persons for justices of the peace. In pursuance thereof the county of York was divided into eighteen districts; and the township of Hamilton's Bann therein, was formed, and still continues one district, for which the defendant has been commissioned.

Between 1777 and the 2d September 1790, when the constitution was amended, ten new counties were erected; to wit, Washington, Fayette, Franklin, Montgomery, Dauphin, Luzerne, Huntingdon, Allegheny, Mifflin and Delaware. In all the laws erecting these counties, there is an express clause, that the justices of the Supreme Court shall have like powers, jurisdictions and authorities, within each newly created county, as by law they were vested with and entitled to in the other counties within the state. In Franklin county alone, the words of the provision are general, and relate to all courts. And in the several laws, except as to Washington and Luzerne, it is declared, that justices of the peace commissioned in the old counties, who should fall into the new counties, should have all the powers and jurisdiction in the new counties, which were attached to their former office, during the periods of their respective commissions.

It has been objected in the argument, that these last provisions evince the sense of the legislature, that without them, the commissions of the old justices would be vacated, if their lots were cast into the new counties. To this I answer, that these clauses can only be considered as merely declaratory of what would have been the constitutional effect of the division of each county. The omission of them, as to the counties of Washington and Luzerne, is readily accounted for, on the ground, that no commissions of justices of the peace existed as

to the former county, by reason of the disputed jurisdiction and claim of Virginia, to that tract of country ; nor as to the latter, by reason of the many intruders, pretending to hold under the Susquehannah company. As to what is now called Luzerne county, it appears by the act of assembly, passed 9th September 1783, (Loose Acts 197,) that the commissioners appointed by the state, to enquire into the cases of the settlers under the Connecticut claim, had made their report to the house of assembly ; that they had sub-divided Wioming township into three distinct townships, and that they had divided them into two districts for the election of justices of the peace ; in pursuance whereof, eight persons had been elected ; and the law directed, that four or more of the persons elected, should be commissioned as justices of the peace by the Executive Counsel. But afterwards, by a law passed on the 24th December 1785, (*Ib.* 6,) so much of the former act as confirmed the divisions of those townships into districts, for electing justices of the peace, and empowered the counsel to commissionate four or more of the persons so elected, was repealed, and the commissions granted in pursuance of the law, were annulled and made void. The council of censors had before this period, expressed their opinions, as to the deviations of the legislature from the constitution in certain instances ; as will hereafter appear when I come to mention the law of 4th April 1785 ; and it is highly probable, that the legislative interference, as to the creation of these justices of the peace, formed the constitutional ground, on which it was afterwards repealed.

The constitution was the paramount, fundamental law, prescribed by the people, limiting the exercise of power, by the general assembly ; and the latter had no right to appoint justices of the peace, though they had the power of directing the division of districts, for the purposes of electing them. Hence the law of 31st March 1784, 2 Dall. St. Laws 200, Loose Acts 335-6, was enacted, which remedied the defect of former laws on this head ; and in sect. 14, provided, that the president and council might form new and additional districts for justices of the peace, on the certificate of the Court of Quarter Sessions of the county that such division became proper and would be useful. The 4th section contemplates justices of peace continuing in their commissions for the residue of their seven years ; and the 5th and 6th sections profess to fix a regular mode of holding future elections, to supply vacancies, happening by expiration of their commissions, death, resignation, removal out of the district, removal from office for misconduct, or upon the neglect or refusal of any person elected and commissioned to take upon him the office. Hence also arose the law of 4th March 1786, 2 St. Laws

424, Loose Acts 28, which enabled the president and vice president in council, to order a new and equal distribution of townships into districts. The 8th section assigns the number of justices of the peace to boroughs and county towns ; and the 9th section provides, that no commission of any justice legally elected, shall be affected by any thing in the act.

The law of the 4th April 1785, Loose Acts 546, asserts in the preamble, " that the due and orderly distribution and exercise of the powers of government as the same have been devolved by the people to their trustees in the legislative, executive and judicial departments of the state, is of great importance to the liberty and happiness of the community, and every encroachment made by any of these departments, on the rights and privileges of the other, has a manifest tendency to disorder and anarchy on the one hand, or to dangerous accumulations of power on the other ; and that the council of censors had declared it to be their opinion, that the appointment of revenue and all other officers not expressly assigned to the house of assembly, or to the people by the constitution, which has been exercised by the general assembly, is a deviation from the constitution." It then proceeds to designate the choice of officers, reserved to the general assembly, and declares, that all those officers, save those specially reserved to the choice of the people, shall be nominated and appointed by the Supreme Executive Council. And in sect. 3, it is declared, that divers officers, who held their offices, by their names having been inserted in the body of acts of assembly, in derogation of the rights of the Executive Council, improperly held the same.

Afterwards, by an act passed on the 13th September 1785, Loose Acts 634, certain Laws respecting the chief burgess of the borough of Lancaster, and the burgesses of the boroughs of Carlisle and Reading, were repealed, so far as they contradicted the constitution.

Upon this recapitulation, it cannot be pretended, as I conceive, that the general assembly could constitutionally make a justice of the peace, or remove him during his period of seven years, except for misconduct. When therefore we find clauses in the law under the old constitution, erecting new counties, that the old justices of the peace, who might fall into the limits of the new counties, should be considered as justices of the peace of the new counties, I feel myself constrained to pronounce, that such clauses shall be deemed as declaratory of the constitution. In like manner, the legislature have declared, that the Supreme Court shall have and exercise jurisdiction in the new counties ; but independent thereof, this court would certainly be competent

to this exercise of authority, under the words and meaning of the constitution.

To declare what the law is, or has been, is a judicial power ; to declare what the law shall be, is legislative ; and one of the fundamental principles of all our governments is, that the legislative and judicial departments shall be separated. 2 Cranch 277, assented to by the justices of the Supreme Court of the United States.

The new state constitution came into operation on the 2d September 1790. The 10th section of the 5th article of that instrument runs thus: " The governor shall appoint a competent number of justices of the peace, in such convenient districts in each county, as are or shall be directed by law : they shall be commissioned during good behaviour ; but may be removed on conviction of misbehaviour in office ; or of any infamous crime, or on the address of both houses of the legislature." Since that time, the counties of Lycoming, Somerset, Greene, Wayne, Adams, Centre, Beaver, Butler, Mercer, Crawford, Erie, Warren, Venango, and Armstrong have been erected ; but of the last eight, Crawford only is organized, at the time of the former argument. Since that period, the counties of Jefferson M'Kean, Clearfield, Potter, Tioga and Cambria have been erected by a law passed 26th March 1804. 6 St. Laws 365. The several laws which have effected these creations of counties, established by direct words the general authority of the Supreme Court over them, save as to Somerset county, which is reached by the general expressions of the 2d section of the act. 3 St. Laws 741. The acts which erect that county and Greene, have special clauses, that " all the justices of the peace then commissioned for the old county, who reside within the limits of the new county, shall be considered as, and shall be justices of the peace for the new county : " but as to the other counties, there are no such words inserted.

I consider these clauses in the two acts, as strong arguments of legislative exposition of the constitution. Arguments have been drawn from that source by the attorney general. If the commissions of old justices of the peace resident in the new counties, were necessarily vacated by the division of the old counties they could not constitutionally be revived by a law ; but the governor must for that purpose exercise his undoubted executive right of appointing and commissionating them. The remark before made, as to the vesting power and jurisdiction in the Supreme Court over the new counties erected under the first constitution, is equally applicable to laws made since 1790, for the same purpose. The jurisdiction of this court by the 3d sec-

tion of the 5th article of the constitution, extends over the whole state, and rests not on these laws.

It has however been objected, that the 7th section of the act erecting Wayne county, directs, "that the sheriff, coroner, or other officers of the county of Northampton, other than the justices of the peace, shall continue to exercise the duties of their respective offices within the county of Wayne, until similar officers shall be appointed, agreeably to law, within the said county." 4 St. Laws 241. I answer, these words can mean no more, than that the justices of the peace, who live in Northampton county, after Wayne county was struck off, shall not act as justices of the peace for Wayne county. This will appear most clearly, by a reference to the laws of 17th April 1795, and 9th February 1796, erecting Somerset and Greene counties. In the 8th section of both these acts, we find the same words as have been extracted from that respecting Wayne county; but yet, in the 4th section of the Somerset law, it is declared, "that all the justices of the peace now commissioned for the districts of the present county of Bedford, who reside within the limits of the county of Somerset, shall be considered as, and shall be justices of the peace for the said county of Somerset." 3 St. Laws 742. And the like words are used *mutatis mutandis*, in the 5th section of the Greene law. 4 St. Laws 5. The 5th section of the act erecting Adams county, omits the words, "other than the justices of the peace," though it enumerates the other officers.

It has been urged, though faintly, at the bar, that an alteration in the name of the county by law, may vacate the commissions of justices of the peace, inasmuch as they can no longer style themselves justices of the peace of the county, *eo nomine*, of which they were commissioned. But this I cannot accede to; because, if the legislature had thought proper to change the name of York county into Adam or Jefferson, instead of subdividing it, it would not, nor could not, operate as a determination of these commissions. The districts of the justices would continue, and the limits of the county would remain as before. By operation of law the justices of the peace would assume the style and name appropriated to the county.

A more plausible objection remains to be considered, which is, that by a subdivision of the old county, the local extent of the justices' jurisdiction is abridged by law. But if this be a solid ground, and enures as a virtual vacation of the commissions of old justices of the peace who may fall into the new county, must it not necessarily produce the same effect on the commissions of justices of the peace resident in the old county? The objection, if well founded, is applicable

to each class of justices of the peace ; because, by a division of the county, the jurisdiction of both must of course be diminished in point of local extent, and the argument would therefore prove too much. My mind in this particular is satisfied by the consideration, that the districts still continue, on which the appointments are constitutionally founded ; that the jurisdiction of justices of the peace spreads over the whole county which comprehends the district ; and therefore, that an alteration of the boundaries of the county wherein the districts originally lay, cannot impair the validity of the commissions. In this mode only can I reconcile the words of the constitution. The defendant here obtained no increased jurisdiction by a division of York county.

The present case is not that of a new county, composed of parts of old counties thrown together. It is wholly free of that difficulty. When such a case does occur, and the question arises on the validity of the commissions of the justices of the peace of the old counties cast into the new county, under such circumstances, it will be time enough to decide it when it is regularly brought before us.

The present question is rendered more important and interesting to the community, from the circumstance of the present defendant, and Alexander Russel, esq. having acted as justices of the peace of Adams county, since the equal division of the members of this court, on the former argument on the 1st January 1802. Mortgages and deeds acknowledged, or proved before them, may be thrown into jeopardy. Every judicial act, whether of a civil or criminal nature, which they may have performed since the division of York county, if their commissions cannot be sustained, will render the different officers trespassers, unprotected by the process which they have executed. But I do not bottom my opinion on these considerations. I have declared my sentiments, formed on mature consideration, as they were reduced to writing more than five years ago, with a few slight alterations.

Upon the whole, the defendant, Mr. M'Clean, holds his office as a justice of the peace, under the constitutional tenure of good behaviour ; and the independence of the judicial department is of great importance to the liberty and happiness of the community. He has been duly commissioned in a convenient district, directed by law, from which he has never removed, and that district still continues. He has not been convicted of misbehaviour in office, or of any infamous crime ; nor have both houses of the legislature addressed the governor for his removal. I therefore am of opinion, that his commission as a justice of the peace of Adams, stands in full force ; and that the in-

formation prayed against him in the nature of a *quo warranto*, should not be granted.

Brackenridge, J. A county is a corporation, with commissioners, treasurer, coroner, sheriff, constables, justices of the peace, judges of the courts, &c. It is struck off from the state at large, and may be, as in this case, within the bounds of an old county ; but it becomes a distinct and independent body. Can the commissioners, treasurer, coroner, sheriff, &c. of the old county, continue to act within the new ? Not unless their authority is specially saved in the act of incorporation of the new. This has been done in the erecting many counties. It has been done as to certain officers in erecting this county. 4 St. Laws 533. "The sheriff, coroner, and public officers, of the county of York, shall continue to exercise the duties of their respective offices within the county of Adams, until similar officers shall be appointed agreeably to law within the said county of Adams."

Is a justice of the peace such an officer as is within the meaning of this act ? If so, he is at least supersedable, and superseded at all times by the elections or appointments of others of the same description and authority, in the ordinary, way provided by the constitution and the laws of the commonwealth.

But can an officer of the old county, the justice of the peace in question, falling as to residence within the new, act within the new, independent of any legislative act ? How can he become known to the new ? There seems some copula wanting to connect him with it.

It may be matter of authority, to consider what has been the legislative construction in the case. By implication, we have abundant evidence.

Our first legislative act is that of erecting Lancaster county. By this act it is provided that the county of Lancaster shall enjoy all and "singular the jurisdictions, powers, rights, &c. which any other county doth or may, or ought to enjoy." 1 St. Laws 242. But nothing is said specially of the appointment of the justices.

The act for erecting York county, specially provides even for the jurisdiction of the Supreme Court ; and justices (meaning county justices) shall be commissioned by the governor. *Ib.* 326.

In erecting the counties of Cumberland, Berks, Northampton, Bedford, Northumberland, it is provided in the same words as to the Supreme Court, and as to the justices. *Ib.* 328, 352, 562, 607, 663.

These acts were under the proprietary government.

In erecting the county of Washington, under the constitution of September 28th, 1776, the jurisdiction of the Supreme Court is preserved ; and it is directed, that justices shall be elected in the townships and commissioned by the president and council. *Ib.* 874.

In erecting the county of Fayette, (2 St. Laws 155,) provision is made in like manner ; and also for the first time, it is provided in the act of incorporation, “ that the justices of the peace commissioned at the time of passing this act, and residing within the county of Fayette, or any three of them, shall and may hold, courts of General Quarter Sessions of the Peace and General Gaol Delivery, and County Courts for the holding of Pleas, and shall have all and singular the powers, rights, jurisdictions and authorities, to all intents and purposes, as other the justices of the Courts of General Quarter Sessions and justices of the County Courts for holding of Pleas in the other counties may, can, or ought to have, in their respective counties. ”

It is observable, that it is as judges of courts, authority is given them, not as justices of the peace, generally for the keeping of the peace and the recovery of debts. By the constitution of 1776, chap. 2, sect. 26, the legislature may establish courts, and under this power it may have been, that they undertook to establish judges.

In erecting the county of Franklin, it is provided, “ that the justices of the peace of the present county of Cumberland, which will be hereafter within the said county of Franklin, shall be justices of the peace for the said county until the expiration of their several terms, for which they were respectively appointed. ” 2 St. Laws 116. This goes the whole length of the powers of a justice of the peace.

In erecting the county of Montgomery, power is given to justices commissioned in the old, to act as justices in the new. *Ib.* 221.

In erecting the county of Dauphin, justices already commissioned are authorised to act as judges. Power is not given to act as justices of the peace generally. 2 St. Laws 254.

In erecting the county of Luzerne, provision is made for the electing and commissioning justices. *Ib.* 466. Nothing is said relative to justices already commissioned.

In erecting the county of Huntingdon, the justices of the peace commissioned at the time of this act, and residing within the bounds and limits of the said county, shall be justices of the peace for the said county, during the time for which they were so commissioned. *Ib.* 527.

By the act erecting Allegheny county, provision is made, that

justices now commissioned and within the limits of the new county, may hold courts. Ib. 595.

By the act erecting Mifflin county, justices commissioned at the time and residing, &c., shall be justices of the peace for the new county. Ib. 718.

By the act erecting the county of Delaware, "the justices then in commission are authorized to hold courts; and that all public officers other than justices of the peace shall continue to exercise the duties of their respective offices, until similar officers shall be appointed." Ib. 732. This clause implies several things. 1st. That a justice of the peace might be comprehended under the terms "public officers." 2dly. That he could not act without the aid of the legislature.

It has been doubted, and might well be doubted, whether as a justice of the peace deriving his constitutional existence from the commission of the president and council, he could derive any extension of authority, from an act of the legislature. So far as respected their authority as justices of the peace generally, this legislature excepted it.

The act of assembly erecting Lycoming county is the first erecting a county, after the constitution of 2d September 1790. 3 St. Laws 716. It is provided that the president of the 3d district, of which district the said county of Lycoming is hereby declared to be a part, shall have like power, &c. but no notice is taken of the associate judges that might fall within it, nor of justices of the peace.

In erecting the county of Wayne, it is provided, "that the sheriff, coroner, and other officers of the county of Northampton, other than the justices of the peace, shall continue to exercise the duties of their respective offices within the county of Wayne, until similar officers shall be appointed agreeably to law within the said county." 4 St. Laws 242. This act is under the constitution of 2d September 1790.

In the act erecting Centre county, the jurisdiction of the Supreme Court, as in all other acts, is extended, and that of the district presidents; but no notice is taken of justices of the peace. Ib. 542.

In erecting the last counties in the state, those of Beaver, Butler, Mercer, Crawford, Erie, Warren, Venango and Armstrong, the authority of the judges of the Supreme Court and district president is extended, but no reservation of the powers or authority of an associate judge, or a justice of the peace.

Expressio unius est exclusio alterius. The question will then come to this. Can the justices of an old county act in the new without the reservation of their authority, by the legislature, in the incorporating act? How can he be known to the new county? Can the

justice of York county in his commission, begin his precept, "Adams county scilicet"? In this case, he might act in both counties; in the old county, by the authority of his commission, and in the new, by virtue of his residence.

But is not his commission during good behaviour, and can the legislature by erecting a new county, in fact abolish it? It does not affect his commission; it abridges or takes away the sphere of action only: his commission was taken, subject to the eventual subdivision of the county; a power which the legislature has and must exercise. And I take it, there is no privation of right in the case; and that independent of the aid of the legislature, to say the least of it, a justice acting in one county under colour of a commission in another is a trespasser.

The strongest thing that occurs to me, to be said to the contrary, is the term "public officers," in the act for erecting the county of Adams. "The sheriff, coroner and public officers of the county of York, shall continue to exercise the duties of their respective offices within the county of Adams, until similar officers shall be appointed, agreeably to law, within the said county of Adams."

In the act for erecting the counties of Delaware and Wayne, there is the like provision, with an exception "as to justices of the place;" which exception, I take to be explanatory, and not implicative, that under the term "public officers" justices of the peace could be comprehended. It is as much as to say, by "public officers" we do not mean, justices of the peace. Independent of the explanation, it must have been evident, as in the case before us, that the legislature could not mean these. The reservation of authority is in favor of public officers, until similar shall be appointed. The provision therefore must respect officers, supersedable by the appointment of similar. Under the term "public officers" therefore I take it, justices of peace are not comprehended. There being no legislative act in conservation of their authority, and extension of it to the new county, it can be known only to the old.

The argument comes to this, that the commission of the justice of the old county does not enure for the use of the new; unless there is a saving of his jurisdiction in the erection of the new that is, the new county erected subject to the jurisdiction, if this could be done. It does not lie upon me to say, that it could. But *a fortiori* it cannot be without. And in this case, there is no saving, but the new county laid out without respect to the jurisdiction of the justice. He may remain a justice of the old county therefore, and may withdraw within it, and act, but has no connection with the new. He is not known to it *de facto*, nor by operation of law, nor by legislative exception, or

recognition or new commission from the governor by virtue of his signature to a law directly, or by implication authorizing him to act, if the signature could be supposed to have that effect ; which it is not necessary for me to say that it has ; but certainly without it, there cannot be authority, for an officer dismember from an old county, to act in a new.

Motion of the Attorney General granted.

AT A CIRCUIT COURT, HELD AT WEST CHESTER FOR
CHESTER COUNTY, APRIL 1807.

CORAM—YEATES, JUSTICE.

Lessee of JOSEPH SHARP, by his guardian JOSEPH PAXTON, jun.
against JOHN PETIT.

A will proved by two witnesses, before a justice of the peace and registered, admitted in evidence.

EJECTMENT for a messuage and 100 acres of land, in Sadsbury township.

The lessor of the plaintiff claimed as heir at law of his father Joseph Sharp, to whom the premises were devised in fee tail, by the last will of his grandfather James Sharp, dated 14th February 1777.

The will was attested by three witnesses, Duncan Morrison, Samuel Martin and William Livingston. The two latter had proved the will on the 14th July 1781, before William Clingan, esq. a justice of the peace for Chester county. Livingston was now called, and swore to the execution of the will, and the sanity of the testator ; that Morrison was a schoolmaster, who had drawn the will, and had left that part of the country many years, and had not since been heard of ; and that Martin, some years before had removed to Marsh creek, in York county, but how long since he had been heard of, the witness could not tell.

The counsel for the defendant objected, that the will had not been duly proved by two witnesses, agreeably to the act of assembly of 1705. 1 Dall. St. Laws 53. The justice of the peace had no jurisdiction in taking the probate.

Sed per cur. It certainly would be more regular to prove the will before the register of the county ; because it is a branch of his duty,

which he must be supposed to understand better than a justice of peace. But the act does not expressly confine the depositions to be taken before the register within the state ; and we well know, that many wills in several counties, have been proved before justices of the peace. In a contest respecting lands, probates of wills have always been received in evidence ; but they are not conclusive.

The defendant showed in evidence a deed from William Gibbons, sheriff, to Thomas Allen, founded on a regular judgment and executions against Joseph Sharp, the father, dated 20th September 1785, for 250 acres, comprehending the lands in question, in consideration of 386l.; and that Allen came into possession, in pursuance thereof. A common recovery was afterwards suffered in February term 1788, wherein Thomas Ross was demandant, and the said Thomas Allen, tenant ; whereupon Allen vouched Joseph Sharp the tenant in tail, and he vouched the common vouchee. Sharp conveyed the premises to Allen on the 17th and 18th March 1788, by deeds of lease and release, in consideration of 386l. and Allen conveyed to William Petit, the father of the defendant, on the 29th April 1790, in consideration of 700l.

It was objected here by the plaintiff's counsel, that the recovery was erroneous, there having been no proper tenant to the præcipe. The interest which the tenant in tail had in the lands, was such before the sheriff's sale, as might have been enlarged into an absolute estate in fee simple : but the title was divested by the sale in such a manner, as he could no longer suffer a common recovery. The seisin of the tenant must be proved, in recent cases. 2 Espin. Dig. 486, 491, 735. Unless he be actually seised of the freehold, the recovery is void. Pig. 28. 2 Bl. Com. 562.

It was answered, that here was a seisin by the tenant, as well *de jure* as *de facto*. Common recoveries are much favored as common assurances, 2 Bac. 544. 1 Wils. 73. The great question in these cases is, had the tenant in tail, the power of barring the entail ? 1 Burr. 114, 115, 116. The tenant to the præcipe is a mere instrument to validate the recovery. *Ib.* 117. The inheritance continued in Joseph Sharp, notwithstanding the sheriff's sale ; and hence it was, that his widow recovered her dower in these very lands, in this court. A recovery with double voucher bars all latent interests, and the whole estate tail. 2 Bl. Com. 358. 2 Bac. 448, (526.) The tenant in tail when vouched, comes in privy of all the estate he ever had. 2

Salk. 571-2. Tenant in tail discontinuing, and taking a new estate, a recovery had against the grantee, who vouches the tenant in tail, the recovery is good. 18 Vin. 212, pl. 11. Pig. 116. A recovery shall be intended to be good, unless the contrary be proved. Cro. Jac. 454-5.

The injurious consequences attending estates tail in England, induced the judges to elude the effects of the statute *de donis condition- alibus*, by the fictitious proceedings in common recoveries, founded on an ideal recompense against the vouchee. Our act of 27th January 1749-50, valibates such recoveries, when made according to the common or statute laws of England. The preamble of the law strongly expresses, "that the entailing of estates, without a provision by law for barring them, would introduce perpetuities, prevent the improvement of such estates, disable tenants in tail to make provision for the younger branches of their families, prove of general detriment to the province, and be attended with manifold inconveniences," &c. 1 Dall. St. Laws 334. And so far has the policy of the state been carried, that by a late act passed on the 16th January 1799, estates tail may be barred by a common deed of bargain and sale, acknowledged in open court. 4 St. Laws 321. And though the deed to make a tenant to the præcipe, be not executed till after the execution of the writ of seisin, still will the recovery be good, if the deed be made within the term in which the recovery is had. 5 Term Rep. 177, 179.

Yeates, J. charged the jury, that the recovery suffered was effectual to bar the estate tail. There is not a shadow of reason, why a fictitious tenant to the præcipe, unaccompanied by the actual possession of that tenant, shall support a common recovery, and that a real *bona fide* purchaser, actually holding the premises during the life of the tenant in tail, should not be equally effectual for that purpose, when the proceedings were carried on with the full concurrence and participation of the tenant *pour auler vie*, and of the remainder man in tail.

Experience has evinced the baneful effects of lands remaining unalienable in a family; and that system is peculiarly repugnant to our laws and manners. Lord Kenyon says, (5 Term Rep. 179,) that the revival of common recoveries was found so beneficial, after the statute *de donis* had passed, that it has been the endeavor of all succeeding ages, to facilitate that mode of conveyance; care however being taken, that the forms prescribed are complied with. It must be admitted, that to maintain them, there must be the proper *actores fabulæ*.

It has been objected, that the estate of Joseph Sharp, the father was sold by the sheriff, and that he had no interest remaining in th

lands. But the right of inheritance certainly continued in him, and his eldest son must have claimed after his death through him *per formam doni*. The sheriff could only sell the lands during the life of the tenant in tail, until the estate was enlarged by a common recovery. The inheritance remaining in him notwithstanding the sale, it was competent to him, to convert the fee tail into a fee simple estate. At common law, the disseisee, after a disseisin, could neither sell nor devise the lands. 1 Burr. 112. And yet where a writ of entry was brought against a disseisor, and he vouched the tenant in tail, the issue was barred thereby; (*Ib.* 116;) because he had the right of suffering the recovery. The case cited from Pigot 116, is also applicable. If the recovery is valid, the issue in tail are barred, and the verdict must be for the defendant.

Verdict for the defendant.

Mr. Blair, *pro quer.*

Messrs. T. Ross and J. Hemphill, *pro def.*

The plaintiff afterwards appealed, upon overruling his motion for a new trial; and the appeal came on to argument on the 26th March 1808, in bank, when the court affirmed the judgment below.

AT A CIRCUIT COURT HELD AT NORRISTOWN, FOR
MONTGOMERY COUNTY, APRIL, 1807.

CORAM—YEATES, JUSTICE.

RESPUBLICA *against* JONATHAN CARMALT.

The proviso in the 1st section of the turnpike act of 17th March 1806, that toll shall not be demanded of a person "when passing from one part of his farm to the other along the road," extends not to farms detached from each other.

INDICTMENT for extortion against the defendant, as a toll gatherer for the Chesnut Hill and Spring House Turnpike Company, for receiving unlawfully from Aaron Keyser 4 cents, to permit him to pass through the gate of the company, with a sled and two horses; whereas no such toll was due to the company, the said Aaron Keyser then and there passing from one part of his farm to the other, along the road of the said company.

This company was incorporated by an act passed 5th March

1804. 6 St. Laws 215. The 11th section prescribes certain tolls to be collected and received of all persons, for every five miles of the road, which they shall travel. By a subsequent act passed 17th March 1806, 7 St. Laws 527, the company with others, were placed on the same footing with the company of the Philadelphia and Lancaster Turnpike Road under certain provisions, one of which was, "that none of the companies should have the benefits of this act, unless they relinquish their right of taking tolls from any person, when passing from one part of his or her farm to the other, along the said road."

It was admitted, that Keyser at the time of the company's incorporation, owned and occupied a house and six acres of land in Flower Town, adjoining to the turnpike road, and still owns and occupies the same, and resides thereon; that after the gate in question was fixed, in pursuance of the first law, and previous to the law of 1806, he purchased an out lot of 10 acres, the nearest part whereof, in a direct line to his homestead was about one quarter of a mile, which he also worked; and in passing between the two lots he used the road of the company above half a mile, whereon the gate was placed, and thence passed into a public road crossing the turnpike, which led to his out lot of 10 acres, at the distance of about 60 perches from the intersection of the two roads.

It was also admitted, that the turnpike company had elected to take the benefits of the act of 17th March 1806, and consequently were subject to the proviso; and the only question was, whether Keyser, under these circumstances, when passing from the one lot to the other along the road of the turnpike company, was entitled to an exemption from toll?

After argument by Messrs. Frazer and Porter for the commonwealth, and Mr. T. Ross for the defendant, Yeates, C. J. delivered his opinion to the jury.

The sole point in dispute is, what is the true meaning of this proviso in the act of March 1806? The words are, "when passing from one part of his farm to the other, along the said road." *Other* is a relative term, and therefore it must be read, to the *other* part of his farm, along the road. Does it then mean of the same farm, or of lands adjoining thereto; or shall the words be extended to lands distant therefrom, provided they are cultivated?

The word farm conveys a distinct and precise idea. Its strict and proper sense, is land let to a tenant for culture; and hence the technical expressions in a lease to farm let; but its more enlarged meaning, as generally received, is land used and worked, either with or without a house on it. If detached farms privilege the owners from paying

toll on the intermediate turnpikes, the consequence must be, that an undue preference will be given to opulent men holding and working different tracts of land in the same township, or in different townships, or even in different counties ; because, if one half mile cannot be considered as a separation of two farms within the intent of this proviso, neither can ten or twenty miles produce this effect. No distinguishing line can be drawn, ascertaining on principle what shall be deemed part of the farm, unless we are governed by the natural import of the words. But there is strong reason in asserting, that an incorporated company should not have it in their power to dismember and dissever a farm lying along their road, by their fixture of a toll gate upon any part of it ; and if we suppose that the legislature intended that a turnpike gate should not separate one or more farms lying together in one body upon the road, the property of an individual, so as to subject the owner to the payment of toll, “ when passing from one part of his farm to the other along the road,” we fix a plain principle, just in itself, which may readily be acted upon.

The latter appears to me to be the intention of the legislature, and that the defendant should be acquitted.

The jury convicted the defendant, and the court on motion and argument, awarded a new trial.

SEPTEMBER TERM 1807, AT PITTSBURGH.

FOR THE WESTERN DISTRICT.

CORAM—TILGHMAN CHIEF JUSTICE, YEATES SMITH AND BRACKENRIDGE JUSTICES.

JOHN GAILEY, plaintiff in error, *against* THOMAS BEARD.

A writ of error not returned to the term to which the same was returnable, the suit will not be dismissed on that account. Where such writ has issued shortly before its return, and the record has been removed, the court will presume that it was presented during the sitting of the court to which it was directed.

WRIT of error to the Common Pleas of Crawford county. The writ was tested on the 28th August 1806, returnable on the first Monday in September following, which happened on the first day of the month, and the record was filed in the prothonotary's office on the 25th August 1807.

Mr. Baldwin for the defendant in error, moved to dismiss

the suit. The writ is a mere nullity, not being returned to the last September term. Besides only four days intervened between its being taken out and September term 1806, so that if it was not actually impossible, it was most highly improbable, that the writ could have been read in the Court of Common Pleas at Meadville, at the distance of one hundred miles from Pittsburgh. It will not be pretended, that any adjourned Court of Common Pleas for Crawford county was held in the last week in August 1806. The case of *Blair et al v. Miller et al.* in the Supreme Court of the United States, 4 Dall. 21, is expressly in point on the first objection.

Mr. T. Foster for the plaintiff in error resisted the motion. The first ground is well known to be unwarranted by the practice of this court. Nothing is more common than to take rules to return the record on writs of error, after the term to which such writs are returnable. As to the second ground, the court will form no presumption, that the justices below had acted irregularly. The record is properly returned and spread before the court, who will not go out of it to search for errors, but will confine themselves to what is apparent on the face of it.

Tilghman, C. J. This is a motion by the defendant in error to dismiss this cause, because the record has not been regularly returned. He assigns two reasons: 1st. That the record was not returned to last September term, to which it was returnable. 2d. That the Court of Common Pleas of Crawford county, to whom it was directed, did not sit at any time between the time of issuing the writ of error on the 28th August 1806, and the day on which it was returnable, the first Munday in September 1806.

The first objection the court think is of no weight; because, by long established practice, returns to writs of error have been received after the time to which they were returnable.

As to the second objection, it does not appear to this court, that the court of Crawford county were not sitting between the time of issuing the writ of error, and the day on which it was returnable; nor ought they to presume it. It is always to be presumed that every court acts with propriety, unless the contrary appears. We must therefore suppose, it having been returned in the usual form by the justices of the court, that the writ of error was presented to the court of Crawford county when sitting, and by them properly returned.

It is the opinion of the court therefore, that the defendant in error take nothing by his motion.

JOHN WELCH, plaintiff in error, *against* JAMES VANBEBBER and WILLIAM CHAMBERS.

- The statutes of Jeofaile cures errors in form, when the defendant pleads in chief and a trial has been had on the merits.

WRIT of error to the Common Pleas of Washington county.

It appeared by the record that a summons issued against James Welch for McDonald and Welch and John Welch to answer, &c. returnable in August term 1803.

The summons was returned, served. John Welch appeared and pleaded *non est factum*, &c. The declaration was in these words.

Washington county ss.

In the common Pleas of August term 1803.

Whereas a writ of summons was issued returnable to August term 1803, directed to the sheriff of Washington county aforesaid, commanding him that he should summons James Welch, &c. and John Welch to answer to James Vanbebber and William Chambers of a plea that they render to them \$455 and 50 cents, &c. And whereas the said sheriff returned the said writ with an indorsement thereon, that he had served the said writ on the said Welch only ; whereupon the said James Vanbebber and William Chambers by David Redick complains, that whereas the said James Welch for McDonald and Welch and the said John Welch, by their certain writing obligatory dated the 15th day of November 1794, signed with the proper hand-writing of the said John Welch, and of the said James Welch for McDonald and Welch, at Baltimore, at the county of Washington aforesaid, and sealed with their seals, which is here shown to the court, did promise to pay six months from the date thereof to the said James Vanbebber and William Chambers, or bearer, the sum of \$455 and 50 cents, with lawful interest thereon from the date thereof ; nevertheless the said John, and the said McDonald and Welch hath not, nor either of them, paid to the said James Vanbebber and William Chambers, or either of them, the said sum of \$455 and 50 cents, with interest thereon as aforesaid, and the said John doth refuse still to pay the same, though often requested so to do, whereby the said James Vanbebber and William Chambers say they are damaged to the amount of 740 dollars and thereupon bring suit &c. pledges, &c.

The cause was tried at Washington in March term 1805, when a verdict was given for the plaintiffs for \$455 and 50 cents debt \$280 and 13 cents damages, and 6 cents, costs ; judgment was entered generally.

Mr. Campbell, for the plaintiff in error, stated the following exceptions to the record:

1. The summons issued against James Welch for M'Donald and Welch and John Welch; it is not alleged therein, nor in any part of the pleadings, that James was the partner of M'Donald and Welch; he must therefore be considered as their agent, and the writ should have issued against them, not James.

2. The 1803 following the term, was in figures, and not at length, nor in Roman numerals.

3. There is a variance between the writ and count: the writ is against James Welch for M'Donald and Welch: the count recites the writ, that the sheriff was requested to summon James Welch for, &c. and John Welch.

4. The declaration states, that John Welch only was summoned, and yet the declaration and other proceedings run on against James, and John Welch if they do not include M'Donald and Welch also.

5. No request to pay the money, or refusal on the part of James Welch is laid in the declaration.

6. The summons is returned by the sheriff generally as served, which necessarily includes both James and John Welch: but the declaration states the service of the summons on John only.

Mr. Addison for the defendants in error, answered the exceptions as follows:

1. It does not appear from the pleadings, that James Welch was the agent of M'Donald and Welch, or acted under any authority from them. He might have been one of the co-partners, and could well bind himself, though not his partner by deed. But this could not have been a subject of enquiry, when James Welch was not on his defence, not being summoned: if it could, it might have been urged on his behalf.

2. It was not necessary to insert the year at the beginning of the declaration. An informality in an unessential matter, cannot violate the proceedings.

3. *Etcætera* in law, means all that ought to have been expressed. Co. Lit. 17 b. These words refer to the expressions in the writ, and must be understood to correspond therewith.

4. No judgment could be rendered against M'Donald, because he was not called upon to answer; nor against James Welch, for the same reason. The plaintiffs have stated their cause of action against John Welch.

5. It was not necessary to allege a request to pay to James Welch. The duty here arises from the bill obligatory, not from the demand;

and a debtor is bound to seek his creditor to pay a just debt. What need not be proved on the trial, need not be stated in the plaintiffs' declaration.

6. The judgment could only be rendered against John Welch, who was served with a summons, and has been heard in his defence, according to the declaration. Most of the exceptions taken would have been invalid even upon a special demurrer.

Tilghman, C. J. It must be admitted that the declaration is drawn very inartificially; but it exhibits a substantive cause of action, though drawn informally. None of the objections go to the merits, and on them a jury have decided. If judgment had been rendered against James Welch, there would have been error apparent on the record. It appears however, that John Welch only entered his appearance and was declared against; he only pleaded *non est factum*, which was the issue tried, and the judgment, though entered generally, can refer to him alone.

Yeates. J. If the defendant below wished to avail himself of any variance between the writ and count, he should have pleaded it in abatement. If he insisted on want of form, he should have demurred specially. But he has pleaded in chief, and a trial has been had on the merits. Most of the objections are cured by the statutes of *Jeofaile* after verdict. 1 Dall. 461-2 The only difficulty which presented itself to me was, as to the entry of the judgment on the general return of summons served; but I fully concur with the chief justice in that particular for the reasons he has assigned.

Smith, J. concurred.

Brackenridge, J. The defendant below should have shown the variance by plea in abatement. He shall not be permitted to have a hearing on the merits, and then urge an informality by way of defence, which he ought to have availed himself of in an early stage of the cause.

Judgment against John Welch affirmed.

WILLIAM MILES, plaintiff in error, *against* SARAH OLDFIELD.

The words "you are a vagrant" are actionable; the the act of assembly of 21st Feb., 1767, subjecting the offender on a conviction before a justice of the peace, to an imprisonment at hard labor, for a term not exceeding one month.

Many faults in pleading are cured by verdict. If a declaration contains a substantive cause of action, it will be aided tho' informal. Slander, accompanied by a tortious act, is joinable therewith in one count.

WRIT of error to the Common Pleas of Crawford county. The declaration was in these words:

Crawford County, ss. April Term 1808.

William Miles, of the said county, yeoman, was summoned to answer Sarah Oldfield, of a plea of trespass on the case, &c. And whereupon the said Sarah, by A. W. Foster, her attorney, complains, that whereas the said Sarah now is, and for a long time past has been a citizen of this commonwealth, and always respected and esteemed, and known to be an industrious and orderly person, and never respected, esteemed, taken, or known to be a pauper, or to live idly and without employment, or to go about from door to door, or to place herself in any street, highway, or road, to beg or gather alms, or to wander abroad and beg, or to follow no labor, trade or occupation, and have no visible means of subsistence. And the said William well knowing the premises, but contriving and intending to bring the said Sarah into contempt and disgrace, and to subject her to the pains and penalties imposed by the laws of this commonwealth against idle and disorderly persons, did on the 28th day of February 1803, at the county aforesaid, in the presence and hearing of divers good citizens of this commonwealth, say of and concerning the said Sarah to Jacob Sheppard, a constable of the said county, in the presence and hearing of the said Jacob, she (the said Sarah meaning) is a vagrant (meaning thereby, that she, the said Sarah, was an idle and disorderly person,) and you (the said Jacob meaning) must take her to Squire Hamilton (James Hamilton, esq., a justice of the peace of the said county, meaning,) that he may send her to gaol, (thereby meaning, insinuating, and intending, and giving notice to the said Jacob Sheppard, that the said Sarah was an idle and disorderly person and directing said Jacob to apprehend and convey the said Sarah to the said James Hamilton, esq., a justice of the peace of the said county, as an idle and disorderly person) and did on the said day, at the county aforesaid, actually cause the said Sarah to be apprehended and conveyed to the said James Hamilton, esq., a justice of the peace of the said county, as an idle and disorderly person, by reason of the speaking of the said false and scandalous words, of and concerning the said Sarah, and causing her to be apprehended and conveyed to James Hamilton, esq., aforesaid, as an idle and disorder-

ly person, the said Sarah is greatly injured, as well in her good name, fame and reputation, as also in her person, by reason of her being apprehended and conveyed to the said James Hamilton, esq., a justice of the peace of the said county, and hath received damage to the value of 1000 dollars, and thereof she brings suit, &c., pledges, &c.

The cause was tried on the 28th May 1806, when a verdict passed for the plaintiff below with \$100 damages, and costs.

Mr. Sample for the plaintiff in error, now excepted to the declaration on three grounds :

1. If it be considered as an action of slander, the words laid are not actionable. It will not be said that an indictment would lie for vagrancy.

2. The declaration is vicious in not stating the words to have been falsely and maliciously spoken. Actions of this nature are founded on the falsehood of the words, and the malice of the speaker. All the precedents pursue this form.

3. Slander and malicious prosecution, which are distinct causes of action, are strangely jumbled together in this new fangled mode of declaring by one count. But they are not joinable. Trespass and case cannot be joined. 1 Lord Raym. 272. It was necessary at all events, if the two causes of action could be joined together, to aver, that the prosecution was false and malicious, and without a probable cause, and that it was at an end. All the essentials in a malicious prosecution should have been stated. The present recovery could not be pleaded in bar to a new suit for a malicious prosecution. Though it be after verdict, it is only necessary for the plaintiff to prove what he has laid in his declaration. Nothing will be presumed therefrom, unless it be necessarily implied in its texture. 1 Term. Rep. 145.

Mr. A. W. Foster, *e contra*. Case is the proper form of action, where the imprisonment of the plaintiff arises from the information of the defendant. 2 T. R. 231. To make words actionable in this state, it is not necessary that an indictment should be supportable for the fact charged. If the injured party may be punished for the fact if the charge is true, by a justice of the peace on a conviction before him, slander will lie, equally as if an indictment might be brought for the offence. Under the act of 21st February 1767. 1 Dall. St. Laws 472, one legally convicted of vagrancy, before any justice of the peace of the county, is to be sent to the workhouse, or common gaol of the county, there to be kept at hard labor, for any time not exceeding one month.

The exceptions taken by the plaintiff in error, go to mere matters of form. If a declaration in slander does not lay the

words to have been spoken maliciously, it may be taken advantage of upon a special demurrer: but the party cannot avail himself hereof, on a motion in arrest of judgment, or on a writ of error. Where a plaintiff has stated his cause of action defectively, every-thing shall be presumed to have been proved on the trial; but is otherwise where a bad cause of action is stated Doug. 658. A verdict will aid the want of an averment. 1 Dall. 461. In slander, after a verdict for the plaintiff, court will presume malice to have been proved on the trial. But in the present instance it is charged, that the defendant in error was no vagrant, and that Miles knew it, but contrived to bring her into contempt and disgrace, &c., and that by reason of his speaking the said false and scandalous words, and by her apprehension, &c. she received damage. From the texture of the declaration, both malice and falsehood are strongly imputed to the plaintiff in error: and if there was no malice in his mind, he might have availed himself of it on the trial. If his motives were pure, and he acted on reasonable or probable cause, he would have shown this matter to the jury; because malice is commonly implied from the want of probable cause. 1 Term Rep. 544.

This is not an action for malicious prosecution. No indictment has been sent to the grand jury; no acquittal has taken place in due form of law. But the slanderous words have been accompanied by a tortious act, and they are joinable by law. Slander cannot be supported against two persons, who have spoken the same words, but if accompanied by a tortious act, and laid with the words, it well may. Bull. Ni. Pri. 5, 11.

Two cases occur in the books much resembling the present. The one is Philips v. Fish, Trin. 11, Geo. reported in 8 Mod. 371. There the words were "thou art a villian and thief," by means whereof, he was not only damnified in his reputation, but was carried before a justice of the peace and imprisoned. The plaintiff recovered one shilling damages, but was held to be entitled to full costs. It is true, that no judgment appears to have been given, by the reporter: but the case is cited by counsel in 2 Ld. Raym. 1588, as determined by the court.

The other case is Carter v. Fish, Mich. 12, Geo. reported in 1 Stra. 645, and cited 2 Espin. Dig. 269, where the words were "you have stolen a hen," by reason whereof, the plaintiff was not only hurt in his fame, but by procurement of the defendant, was taken up and carried before a justice. The plaintiff obtained a verdict for one shilling damages and full costs; "because this was not laid as an aggravation, but as a distinct fact; he spoke the words, and he procured him to be carried before a justice."

The declaration before the court follows the form of these two cases, in each of which there is but one count, and none of the essentials of a malicious prosecution were deemed necessary therein. And it is presumed, they will be deemed sufficient authorities, whereon to found an affirmance of the judgment in the present instance.

Tilghman, C. J. delivered the opinion of the court.

The errors alleged in this case are confined to what appears on the face of the declaration. [This he stated fully.] The defendant's counsel has raised several ingenious objections to the judgement on this declaration, which may be reduced to the following heads.

1st. That to call a person a vagrant, is not actionable.

2d. That if this is to be considered as an action of slander, the declaration is bad, in not laying the words to be false and malicious.

3d. That the declaration does in substance contain two counts, one for slander, and the other for a malicious prosecution; and that the malicious prosecution is badly set forth, because it is not said, that the prosecution is ended, and the plaintiff acquitted.

1. The act of 21st February 1767, defines the nature of vagrancy, and authorizes a justice of the peace to commit vagrants to the common gaol, there to be kept at hard labor, for any time not exceeding one month. To charge a person with an offence, which subjects him to punishment of this kind, is in the opinion of the court, actionable. The first objection therefore, is of no validity.

2. Many small faults in pleading are cured by verdict. The court is always strongly inclined to support judgments, after the merits have been tried. The rule of law is, that where the declaration contains a substantial cause of action, it shall be aided, though defective in form. Considering the whole of this declaration, it does sufficiently appear, that the words spoken were false and malicious. It is said, that the plaintiff was not a vagrant, and that the defendant knew this. It follows inevitably, that when the defendant called him a vagrant, he told a malicious falsehood.

3. To the third objection, the cases of *Philips v. Fish* and of *Carter v. Fish* are opposed. In the latter, wherein judgment was given, the plaintiff set forth, that "the defendant said he had stolen a hen, by reason of the speaking of which false and slanderous words, he was not only injured in his character, but by occasion thereof and by the procurement of the defendant he was taken up and carried before a justice," &c.

The jury gave damages under 40s. and the only question was, whether the plaintiff should have full costs, it being an action of slander. The court were of opinion, that full costs should be given ; because the taking up and carrying before the justice, was set forth as a distinct fact. In *Phillips v. Fish*, wherein the cause of action is stated in the same way, the court inclined to the same opinion. It is true, the court are made to say, “ in the principal case, the action is founded on the words spoken ; and the procuring the plaintiff to be arrested for felony, is laid in a different count, and the defendant is found guilty generally, ” &c. By this it must be meant, that there were in substance, two counts, or two causes of action included in one count ; for in form, there certainly was but one count : the case is not very accurately reported. But taking the case of *Carter v. Fish* to be law, as reported, it seems to be conclusive in favor of the plaintiff below : because there the very same objection might have been urged, which the plaintiff in error insists on here ; viz. that the declaration contained a count for a malicious prosecution, in which it was not alleged, that the plaintiff was acquitted : and yet the court gave judgment for the plaintiff. We do not consider this as an action for a malicious prosecution. Vide Term Rep. 225. The declaration is rather irregular. It contains an action for slander ; and also asserts, that the defendant by speaking the slanderous words occasioned the plaintiff to be carried before a justice. It seems to be rather a special injury, arising from the slander. But if according to the case of *Carter v. Fish*, it is to be considered as a distinct cause of action, we will follow the authority of that case throughout and support the judgment of the court below.

Judgment affirmed.

AT A CIRCUIT COURT HELD AT BEDFORD, OCTOBER 1807.

CORAM—YEATES, JUSTICE.

Lessee of DOROTHY McKENZIE, JOSEPH McKENZIE and THOMAS THOMPSON *against* MICHAEL CROW and JOHN ROWLAND.

Plat of a survey made by the assistant of a deputy surveyor for his own benefit, not returned into the surveyor general's office nor signed by the deputy, found amongst the papers of such assistant after his death, cannot be read in evidence.

EJECTMENT for 319½ acres of land in Southampton township. The plaintiff claimed under an application in the name of Thomas Thompson, dated 24th February 1767, upon which it was said, a survey had been made by Robert McKenzie, the known assistant of Richard Tea, the deputy surveyor of the district, the same Robert being the owner of the application.

To prove this, a survey dated 15th May 1767, under the signature of the said Robert McKenzie, and found amongst his papers at the time of his death, containing 319½ acres, was offered in evidence by the plaintiff, as the act of the general agent of the deputy surveyor, and binding upon him.

This paper was objected to, though the hand-writing of McKenzie therein was acknowledged, and that he assisted Tea in making surveys.

And *per curiam*. No survey has been returned into the proper office. This plat is not signed by Richard Tea, nor even a single letter or figure in it ascertained to be his hand-writing; nor was it found in his office. Nothing is shown from which it can be inferred, that the deputy surveyor has recognized this act of his assistant, as a receipt for the surveying fees, or some settled account between them, wherein the supposed act of surveying has been introduced. It cannot therefore be regarded as an official paper, but as verbal declarations of the party that he had made the survey, which being for his own benefit, cannot be received in evidence.

Verdict for the defendants.

Messrs. Duncan and J. Riddle, *pro quer.*

Messrs. Woods, Dunlap and Brown, *pro def.*

[This judgment was affirmed on argument upon appeal. Pittsburgh, September 8, 1809. 2 Binney 105.]

**Lessee of CHARLES COXE et al. *against* JOHN EWING, JAMES RYLAND,
JOHN RYLAND, HENRY STROUP and FELIX MILLER.**

Mentioning an improvement in an application is mere matter of description ; and a party abandons his equity of improvement by not paying back interest from the time of its commencement.

Evidence of improvements in such case will be overruled ; but they may be received, to show that the survey of the adverse party was invalid.

Depositions taken under a commission not received in evidence, notice of filing the interrogatories not being served on the adverse party at least 15 days before issuing the commission.

A person interested in the question may be a witness to prove the identity of blocks taken from marked trees.

EJECTMENT for 560 acres of land on the south side of Juniata.

The plaintiff claimed under a warrant to Gabriel Peterson, for 200 acres of land, on the south side of Juniata, including two Deer Licks, about four miles below the mouth of Yellow creek, dated 20th September 1762 ; also, under another warrant to Samuel Johnston, dated 25th October 1765, including part of Gabriel Peterson's improvement, and adjoining land granted to the said Peterson, below the mouth of Yellow creek, whereon interest was to commence from the 1st March 1760. A survey without date, of 560 acres, was made by Richard Tea, D. S., said therein to be six miles below the mouth of Yellow creek, which was returned into the surveyor general's office on the 19th March 1791.

No evidence was given of Peterson's improvement, nor of any remarkable Deer Licks on the land ; though it was shown that there were several saltish ponds in the different bends of Juniata.

The defendants claimed under two ancient settlements made in 1763, or 1764, by William Sparkes and Robert Friggs, regularly continued to the present time, when interrupted by Indian hostilities. They also claimed under the following legal titles :

An application in the name of the said William Sparkes dated 6th February 1767, for one hundred acres on the south side of the Raystown Branch of Juniata, including his improvement ; upon which a survey of 108 acres and 46 perches was made on the 3d August 1786 by George Woods, and a patent dated 24th November 1787, was issued thereon to Philip Stoner, in consideration of 15l. 8s. Pennsylvania currency.

Also an application in the name of Robert Friggs, dated 2d March 1767, for 200 acres on the Raystown Branch of Juniata, including his improvement, between Frederick Founder and William Sparkes ; upon which a survey was made in the summer of 1777, by Thomas Smith, and a patent dated 4th March 1797, was issued to Henry Shoup executor of Sebastian Shoup to and for the uses declared in his will.

Also a warrant in the name of Philip Stoner, dated 26th October 1773, for 100 acres adjoining his other land on the south side of the

Rayston Branch, and a conditional line made between William Sparkes and Robert Friggs, upon which 8l. 6s. was paid on the same day into the office of the receiver general.

The counsel for the defendants having given in evidence to the jury the legal titles aforesaid upon which they relied, offered to show by parol testimony the actual settlements of the aforesaid William Sparkes and Robert Friggs, commenced in 1763 or 1764, and continued without intermission, unless when the inhabitants were driven from their habitations by the alarms of the savages.

This testimony was excepted to on the part of the plaintiff. The applications of Sparkes and Friggs filed in 1867, do not subject them to pay interest from the times of their supposed improvements respectively. By filing them, they severally abandon *ipso facto* all equity under their settlements. It has frequently been determined, both at Nisi Prius and in the Circuit Courts, that no man shall be permitted to defraud the late proprietaries of the commonwealth, by not ascertaining truly the time of his improvement in his warrant, and retain his right of pre-emption from an earlier period, than he has himself stated. The court have said, that overruling such evidence, tends to good morals; and the present case is within the principle of all the decisions on the subject.

The defendants counsel answered; interest is never calculated back on applications. The practice of filing them first obtained in the proprietary land office in 1766, at which time the consideration money to be paid for taking up lands, was charged from 15l. 10s. currency for every hundred acres, and one half penny sterling per acre to 5l. sterling per 100 acres, and one penny sterling quit rent per acre.

It would be highly unjust, that one should suffer in his claim, to lands by reason of his conformity to the regulations of the proprietary officers, over whom he had no control. The parties here mentioned their respective improvements, and cannot therefore be supposed to have abandoned them. The cases which have been decided, have been in the instances of warrants, wherein no improvements have been stated; or if stated, the times of making them have been fraudulently postponed, which forms an essential difference between those cases and the present. Besides this testimony is offered in behalf of defendants who may show a title in any stranger, to preclude the plaintiff from recovering the lands in dispute.

The plaintiff replied; notwithstanding the introduction of applications in 1766, the practice of taking out warrants to secure prior pre-emption rights was not thereby supposed. Of this we offer three instances to the court, which have been discovered

in the office of the deputy surveyor of this district on a slight search since this argument begun. [These warrants for lands on the west side of the Susquehannah were produced, wherein improvements were called for severally dated in 1767, interest to commence from previous periods.] To this practice Sparks and Friggs should have honestly conformed, if they meant to secure their rights by improvements, and fairly pay for them to the paramount lords of the fee. Mentioning an improvement in an application is mere matter of further description, and has always been so understood. Nothing is more certain, than that a change in the mode of obtaining an office right in general cases, cannot vary the rights of the owners of the land, or discharge a party, who by uniform usage was bound to pay interest from the time of his improvement from such obligation. Such a change in the relative duties of individuals, could never have been intended by the late proprietaries; nor did they so readily part with their interests.

By the court. The present case is certainly allied in point of principle to our former decisions on this subject; and in some of these cases testimony of a similar nature has been overruled, though offered on the part of the defendants. Whether applications filed should be distinguished from warrants in the particular under consideration is now to be determined. The regulations of the land office in 1766, seem to have blended the proprietary interests with those of the poorer class of the community, who might not have ready cash to advance for the purpose of taking out warrants, but who by the addition of their labor to the value of the soil, would give a permanent security for the payment of the consideration money. The new institutions however, cannot be regarded as a variation of the rights of the proprietaries, or the duties of individuals; and I concur in opinion with the plaintiff's counsel, that the insertion of an improvement in an application is nothing more than a designation of the place intended to be located. The instances produced of warrants taken out in 1767, with others which I recollect to have seen of the like kind, evince to me fully, the mode of procedure, when improvements previous thereto were intended to be secured. The old consideration and quit-rents are specified therein, as the terms on which such warrants issued.

It follows therefore that such improvements cannot be adduced to establish a title to the lands anterior to such application. But may they not be given in evidence to show that the plaintiffs, survey could not legally take effect? The time of making it is not inserted in the return, which is a suspicious circumstance, and a departure from the uniform method pursued in such cases. Johnston's warrant was

dated in October 1765 ; and the surveys on both warrants having been made at the same time, it must necessarily have been after that period. But such a survey, if it included the real *bona fide* settlements of third persons, would not have received the sanction of the land office, or of the country, from their uniform usages. It is true that by going into this testimony, the defendants will derive a degree of benefit from improvements, the equity of which they seem to have abandoned ; but this appears inevitable, and flows as a necessary consequence from the investigation of the validity of the survey made for the plaintiffs. In this point of light, I view the evidence as admissible.

The counsel for the plaintiff desired that the point might be noted, and reserved for further discussion, if it should become necessary, which was accordingly done.

The testimony was fully gone into, and the facts opened by the defendant's counsel, were clearly established thereby.

The defendant's counsel offered in evidence the deposition of George Nagel, taken under a commission issued to the state of Ohio.

This was objected to, because the 44th rule of practice in the Circuit Court is, that written notice of the commission should have been served on the adverse party at least fifteen days before the commission issued ; which was not complied with in the present instance.

It appeared, upon examination, that the interrogatories were filed on the 28th September 1805 ; notice given thereof on the 30th September and the commission issued on the 14th October 1805.

The court considered the commission as having improvidently issued, and suppressed the deposition.

Several marked trees were blocked on the different lines claimed by the contending parties, and evidence was given to the jury of the ages of those marks, from the annual growth of trees ; the jury however were desirous of seeing the blocks of those trees in order to account the growth for themselves. Whereupon Henry Putt was offered to prove that the blocks, which he produced in court were those which had been cut from the trees by the order of William Piper the surveyor.

He was objected to, as an interested witness, it being acknowledged, that he claimed and was in the actual possession of lands, holding under the survey, set up by the plaintiff.

Sed per cur. He is adduced as a witness to the court, to prove a collateral fact, viz. the identity of certain blocks, which being established to their satisfaction, the blocks are permitted to go to the jury for their inspection. This is analogous to proving where certain papers were found, or the entries in a day book, which may be done by a party to the suit. Besides, is not Putt a competent witness on legal principles? He may be interested in the question now trying, but cannot be affected by the event of this suit. The objection according to the modern decisions, which we have adopted, goes merely to his credibility.

At the instance of the defendants' counsel, this point was also reserved for future discussion.

Verdict for the defendants.

Messrs. Duncan, Woods and Brown, *pro quer.*

Messrs. J. and S. Riddle, *pro def.*

DECEMBER TERM 1807, AT PHILADELPHIA.

FOR THE EASTERN DISTRICT.

CORAM—TILGHMAN, CHIEF JUSTICE, YEATES SMITH AND BRACKEN-
RIDGE, JUSTICES.

Road in East and West Nantmill townships, in Chester county.

A *certiorari* to remove a road, must set out its beginning and ending, otherwise it will be quashed.

Certiorari directed to the Court of General Quarter Sessions of the peace of Chester county, to remove all proceedings respecting a road, beginning at a road leading from John Root's to Thomas Bull's mill, and extending to the Conestogoe road.

Mr. Frazer, in behalf of the road, moved to quash the *certiorari*. It does not describe the road applied for and confirmed.

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Its beginning only is set forth, which is an imperfect description. It appears by the record, that the road petitioned for, begins on lands late of John Root, deceased, at the road leading from Bull's mill, in East Nantmill, to the little Conestogoe road, near James Cubertson's in West Nantmill, thence by the dwelling house of Tedlinger, to the road leading from Jones's tavern to Pawling's ferry on Schuylkill. It is therefore utterly defective, and could not legally remove the proceedings. For much smaller errors have *certiorari*s been quashed. 1 Salk. 145, pl. 4. 146, pl. 9. 151, pl. 21.

Mr. T. Ross, *e contra*, contended, that the present application came too late, the *certiorari* being returnable to March term 1806. The sessions understood the writ directed to them, and have returned the record.

By the court. Unless the proceedings have been regularly removed, we have no jurisdiction over them. If the word extending in the writ, refers to the road prayed for, it is manifestly a false description; because the road applied for, extends to the road leading from Jones's tavern to Pawling's ferry. But if that word should have a different relation, then at best the beginning of the road is only described. The description therefore is clearly incorrect. The beginning and ending of the road should at least be set out in the writ of removal.

Let the *certiorari* be quashed.

Bridge over Wallenpaupac in Wayne county.

To make a bridge a county charge, it must appear by the report of the viewers, that five of them had viewed the place, and that such bridge was necessary.

Certiorari to the Court of Quarter Sessions of Wayne county, to remove all proceedings respecting the erection of a bridge, over Wallenpaupac waters a branch of Lakawaxen river.

It appeared by the record, that in May sessions 1804, the supervisors of the public roads in Palmyra township, petitioned for this bridge, whereupon six persons were appointed to view the same, and make report to the next sessions. In September and December sessions following, no return was made; but in February sessions 1805, the same viewers were re-appointed, without any continuance of the first order, or a new petition. In May sessions 1805, four of the viewers reported, that the bridge was too expensive for the township; but the report was then disallowed by the grand jury, and also at the September sessions following.

In February sessions 1806, the grand jury declared their opinion, that the bridge ought to be repaired by the county, and the same was allowed by the court, and an allowance was afterwards subscribed by two of the commissioners.

In May sessions 1806, on motion of Mr. Sitgreaves, a rule was given to show cause why the proceedings respecting the bridge, should not be quashed; but the same was discharged by the court on the 3d September following: though the *certiorari* had been read and filed two days before, viz. on the 1st September.

Mr. Sitgreaves now moved, that all proceedings respecting the bridge, should be reversed. The manner in which bridges shall be erected over waters, which cross a public highway, is pointed out by the 21st and 22d sections of the road law, passed 6th April 1802. 5 St. Laws 194. On a representation or petition, a view is to be appointed, and five of the persons so appointed must view the place and report to the next sessions, the necessity of such bridge, and that it is too expensive for the township to erect. If the court, grand jury and commissioners concur therein, the same shall be confirmed, unless an application for a review shall be made to the sessions next after the report has been made on the first view.

Passing over in silence the sessions undertaking to discharge the rule to show cause, two days after the *certiorari* had been read, the following, among other errors, appear on the face of the proceedings.

1. The petition died a natural death, by no report being made to September sessions 1804.

2. No necessity for the bridge is stated in the report.

3. Nor does it appear that five of the persons appointed, had viewed the spot, though four might return.

4. A session should have intervened; but here the grand juries at May and September sessions 1805, refused their concurrence as to the bridge being a county charge.

5. When the grand jury declared their opinion in February sessions 1806, it was, that it should only be repaired, (not erected) by the county.

6. Neither the grand jury, court nor commissioners, find that the bridge was necessary.

7. Only two of the commissioners have approved of the bridge.

Per cur. It is impossible to support these proceedings. It does not appear by the report, that the bridge was deemed necessary by the

viewers, or that five of them had veiwed the spot. We need not go further.

The proceedings must be reversed.

THOMAS BRADLEY indorsee of JOHN FLOWERS, plaintiff in error
against JOHN FLOWERS.

Court will not presume any thing against a judgment. A suit may lie by an indorser against his indorsee, upon a special guaranty.

ERROR to the Common Pleas of Philadelphia county. It appeared by the record, that the suit had originated before Abraham Shoemaker, esq. one of the city aldermen, by a summons tested the 2d April 1805, returnable on the 9th April, John Flowers v. Thomas Bradly, indorsee of John Flowers, and that judgment had been entered by default for the plaintiff below, for \$32 78 cents debts and 50 cents costs. On the 29th April, the defendant claimed the benefit of his freehold, and obtained it. A promissory note was annexed to the record, dated 17th March 1800, whereby one George Ansby, promised to pay to John Flowers or order \$30 in 90 days from the date, which contained the indorsements of Thomas Bradley and John Flowers thereon; and also a protest for non payment by Ansby.

Mr. Meredith, for the plaintiff in error. The suit was brought before the alderman by Flowers, the payee of the note, against Bradley, his own indorsee. What kind of suit will lie by an indorser against his indorsee?

Mr. Todd, for the defendant. Such a suit in general will not lie; but under special circumstances it might be supported, as in the case in 4 Term Rep. . . . There might have been a special guaranty, under faith whereof, the note might have been originally accepted. This would seem to be the case here, by the name of Bradley, being first indorsed on the promissory note; and the payee might have indorsed it over to him, to take the most of it.

Per cur. The note and protest have been annexed to the record, but we can only form a conjecture of what was the real ground of action before the alderman. Here it is possible, that by a particular guaranty, Bradley to whom it has been indorsed, might have been responsible for the amount of the note; and we are not to presume any thing against a judgment. We do not incline to set aside judgments,

unless for manifest error, Bradley has also acquiesced in the judgment, by praying the benefit of his freehold. If injustice had been done him, he might have had his remedy on an appeal upon the merits.

Judgment affirmed.

WILLIAM DUANE *against* PETER MIERCKEN.

Verdict on a special collateral plea, since the last continuance, in an action of trespass, set aside, being contrary to evidence.

MOTION for a new trial, on which a rule to show cause had been given.

The suit was in trespass for an assault and battery, brought to September term 1800; and the defendant pleaded not guilty, with leave to give the special matters in evidence. After a trial had by the plaintiff against John Dunlap, who was implicated in the same trespass, it was agreed, that the other defendants, against whom separate suits had been brought, might plead any matter afterwards, which they might plead on the 9th December 1805.

On the first March 1806, the following plea *puis darrein continuance* was filed.

And the said Peter Miercken by William Rawle, his attorney, comes and defends the force and injury when, &c. and saith that the said William Duane, ought not to have or maintain his said action thereof, against him the said P.; because he saith that the assault, battery and wounding aforesaid, in the declaration aforesaid mentioned, were done and committed against him the said W. by him the said P. jointly with a certain John Dunlap, and that he the said W. after the said assault, battery and wounding done, to wit, in the term of September, in the year 1800, in the Supreme Court of Pennsylvania, before the justices of the said court here, to wit, at Philadelphia, in the county of Philadelphia aforesaid, did implead the said J. D. of the said assault, battery and wounding, and in that action it was so proceeded, that the said W. afterwards and since the last continuance of the said suit by him the said W. against the said P. to wit, on the 5th day of December, in the term of December, in the year 1805, by the consideration of the said court, recovered against him, the said J. D. the sum of \$300, for his damages which he had sustained by occasion of the said assault, battery and wounding, &c. of the said J. together with six cents costs, besides the costs expended, &c. as by the record and proceedings in the same suit now remaining in the said Supreme Court here, will more plainly appear, &c.

And the said P. in fact saith, that he the said J. afterwards to wit on the 8th day of January in the year 1806, at Philadelphia in the county aforesaid, paid to the said W. the sum of \$390 and 46 cents,

in full satisfaction of the damages and costs recovered as aforesaid by him the said W., against him the said J., and that the said W., then and there received the said sum of \$390 and 46 cents, in full satisfaction therefor ; and that the said assault, battery and wounding of him the said W., by him the said J., for the which the said W. hath so as aforesaid recovered and received satisfaction, are the same assault, battery and wounding, whereof he the said W. complains against the said P., and not other or different, and that the said W. D. by whom the said recovery was had against the said J. D., is the same W. D. who now prosecutes as aforesaid against him the said P. M. ; and this he is ready to verify. Wherefore the said P. prays judgment, and that the said W. may be precluded from having or maintaining his said action against him, &c.

The defendant was sworn to the truth of the facts stated in his plea; and on the 9th July 1806, the following replication was filed.

And the said W., by Cæsar A. Rodney, his attorney, says that he the said W., by reason of any thing above alleged by the said P. in his plea since the last continuance of his the said W's. suit against the said P., ought not to be precluded and barred from further having and maintaining his said action against the said P., because, protesting that the plea aforesaid, in manner and form aforesaid pleaded by the said P., is wholly insufficient in law, nevertheless, for replication in this behalf, the said W. saith, that the assault, battery and wounding aforesaid, of which the said W. impleaded the said J. D., in the term of September, in the year 1800, in the Supreme Court of Pennsylvania before the justices of the said court, to wit, at P., in the county of P. aforesaid, and for which on the 5th day of December, in the term of December, in the year 1805, by the consideration of the same court, the same W. recovered against the said J. D. the sum of \$300 for his damages, which he had sustained by occasion of the said assault, battery and wounding, &c. of the J. D., together with six cents costs, besides the costs expended, &c., and which said damages and costs have been paid to the said W. by the said J. D., are not the same assault, battery and wounding in the declaration aforesaid, of the said W. against the said P. mentioned, in manner and form as the said P. above in his said plea, in that behalf alleged ; and this the said W prays may be inquired of by the country.

And the said P. in like manner, &c.

The trial of this collateral issue came on before Mr. Justice Smith ; at the sittings in the city in July 1806, and he now reported the evidence. By agreement of the counsel he read to the jury the notes of the testimony which had been given between Duane and Dunlap on the trial on the 5th December 1805.

James Engle was the only additional witness who was examined. He swore, that Miercken, the defendant, had told him, that some person had taken hold of his arm, which prevented the blow he had aimed at Duane, and thereby hindered the death of the damned rascal.

The single fact for the consideration of the jury was, whether it was the same trespass, as that whereon there had been a recovery against Dunlap; though we might sometimes regret the law was as we found it. Dunlap had not struck a blow, and yet all that had been done by the different defendants, against whom separate actions had been brought, had been given in evidence against him, on the ground of his having been a principal, by aiding and abetting the outrage. It was not pretended that there were distinct trespasses; the declarations and evidence were the same in both cases, except so far as it respected Engle. The plaintiff's counsel depreciated the testimony of the witnesses, which he had adduced on the former trial, and the jury found a verdict for the plaintiff with \$600 damages. *Ld. Ray.* 693. *12 Mod.* 533. *Tidd* 906. *2 Bla.* 317. *Cro. El.* 49. *2 Wills.* 367. *Wallace* 51. *3 Burr.* 1363.

Messrs. Lewis and Condry in support of the rule to show cause. This court will govern themselves by the settled law as it is written. In joint trespasses, the defendants are all of them liable to the plaintiff, and he may proceed against any or all of them, if he pleases, as it is but one trespass and all are liable; yet he shall have but one satisfaction from them all. If a joint suit is brought against several defendants for the same trespass, and the issues are tried at the same time, the damages cannot be severed. But where the issues are separately tried, or where separate actions are brought against the several defendants, different damages may be assessed: and the plaintiff has his election *de melioribus damnis*; still he can have but one execution and one satisfaction. *1 Johns. N. Y. Rep.* 290. *11 Co.* 5. *Carth.* 19, *21 S. C.* 3 *Mod.* 101. *Cro. El.* 30. *Hob.* 66. *W. Jo.* 377.

The plaintiff here was not bound to receive the damages assessed against John Dunlap; he might have taken his chance of the verdicts against the other trespassers whom he had sued, and then made his election. But having received those damages, he is bound thereby, and must blame his own folly.

Upon the trial of Duane v. Dunlap, the evidence only went to show, that he was present at the time of the assault and battery, without any preconcerted system of insult or injury; and whether he aided or abetted the fact, was highly problematical. But is certain, that he neither assaulted nor made a single stroke at Duane. There the plaintiff's counsel insisted, "that where several persons are engaged

in a tortious act, all present and aiding and assisting in it, are equally culpable, and liable to answer for the whole of the mischief done ;” and cited Comy. Rep. 619, 621, 623, in proof of his assertion. The court adopted the doctrine without hesitation, and charged the jury accordingly ; and on this ground alone, could the verdict have been supported. But on the trial of the present special issue, a new doctrine was advanced by the same counsel, that in a joint trespass, each person was responsible only for his own conduct, and according to the degree of individual demerit. And in pursuing this system, he went to the unheard of length of attempting to disprove those witnesses, by whose testimony he had succeeded in the former suit !

The jury were called to decide a simple question ; was this the same trespass for which there had been a previous recovery against John Dunlap ? The declarations, with the difference of the defendant’s name, were precisely the same in both causes : the pleas were the same ; the place where, and the time when the injury was committed, were the same ; and so were the parties to the whole transaction. The evidence given upon the first trial was read from the notes taken by one of the judges who sat thereon ; and Engle, who was the only witness examined at the last trial, was not present when the affray took place.

How then can it possibly be said, that there have been in this instance, two distinct different trespasses ? What rational man can doubt, whether the present verdict is not directly against evidence ? We conceive it to be an outrage against the evidence, morality and religion ; and that the court sit as the constitutional barriers to preserve the laws inviolate, against all attacks whatever, as well of jurors as others.

No counsel appeared on the part of the plaintiff, although the argument was postponed for some days, to give him an opportunity of retaining other counsel, in the absence of Mr. Rodney.

Yeates, J.* I feel myself as much bound by my official duty, to exercise a known legal discretion in the present instance, as in any case whatever, which can come before us. This verdict is opposed, as being plainly contrary to evidence. It has been stated by Judge Smith, who tried the cause, that the testimony given by the plaintiff, was expressly the same as that adduced in the trial against John Dunlap, and that he read it from his notes. Engle only was examined on the trial, and his testimony was

*Tilghman, C. J. took no part in the argument, having been formerly of counsel with one of the defendants.

confined to the declarations of the defendant, after the commission of the act.

The special collateral issue was, whether the trespass and assault and battery were the same, or distinct and different, from those instituted against Dunlap. We well know, that what all the trespassers did, was given in evidence against Dunlap, upon the ground, that all were principals in the trespass, and each person responsible for the acts of the others; and that the whole court sanctioned that doctrine. It is not at present a matter of inquiry, whether the damages assessed against Dunlap, were adequate or inadequate to the whole injury sustained. No different evidence of a new and distinct trespass was adduced against this defendant; and I cannot hesitate in declaring, that the verdict was against the evidence, and that the rule be made absolute.

Smith, J. In my charge to the jury, I cautiously avoided the intimation of any opinion, whether the damages found against Dunlap, for the joint trespass, were sufficiently high, under all the circumstances of the case.

But it was impossible for me to doubt, whether it was the same trespass. The same evidence was given in both suits, except the testimony of Engle, which does not vary the case; nor was it even pretended, that there was any other trespass at a different time or place. I therefore clearly think, there should be a new trial.

Brackenridge, J. I differ. For a joint trespass, the plaintiff has his election to bring a joint or several action. In my idea, the whole matter could not be taken into view by the jury who tried the action against John Dunlap, nor is it possible for me to believe, that one man should pay for the blows inflicted by another. This cause was submitted to the jury, on the single point, whether it was the same assault, battery and wounding, as that formerly tried against Dunlap. The jury have found that it was not, but a distinct trespass, and have assessed damages. And this, I am of opinion, is conclusive on the court.

Rule made absolute.

WILLIAM DUANE *against* JAMES SIMMONS.

Substantial finding of a collateral issue, held sufficient.

THIS cause was tried at the last sittings in July 1806, upon a collateral issue of the same kind, and for the same cause of ac-

tion, as the one herein before stated. A privy verdict was found in these words, and was so entered. "The jurors in the above case do consider in opinion, that the above case is precisely the same as that brought by the same plaintiff against John Dunlap, and tried in the Court of Nisi Prius in December term 1805." "James Dilworth, John Saulnier, John Morris, James Brady (§§), John Lohra, David Lapsley, Jonathan Bunting, Peter Deal, John Hayward (§§,) Anthony Cuthbert, Naphthali Hart, Frederick Piper (§§,)" the names of the jurors were subscribed thereto.

To this was subjoined the following "note; those jurors whose names are marked thus (§§) do not think that the defendant's should be cleared of the guilt."

It was submitted to the court without argument, whether this finding was sufficient or not.

The court, in the absence of the chief justice, declared their opinion, that the issue was substantially found *una voce*. All the jurors assented to the verdict, when they appeared in court; and the suggestions of the three jurors concerning the defendant's guilt is at most but surplusage.

Judgment for the defendant.

JOHN DESCAMPS *against* STEPHEN DUTIHL and WACHSMUTH.

The court will direct a verdict to be entered on a particular count, where no evidence has been given on the bad or inconsistent counts.

Mr. Phillips for the plaintiff moved for leave to enter his verdict on the second count in the declaration, to which the evidence was immediately applicable.

The declaration consisted of three counts; the first and second were laid in different ways in special assumpsit; the third count was for money had and received. The money received was said to have been received since the commencement of the suit

Mr. Duponceau for the defendants, opposed the motion. Evidence was given on the money count, and all the transactions between the parties were gone into, and submitted to the jury. However hard the verdict may be, the defendants are willing to acquiesce therein, and are ready to pay the damages and costs. The practice of allowing verdicts to be entered on a particular count, where a general verdict has been

rendered, only holds, where there has been a bad or inconsistent count, on which judgment might be arrested, and not where any evidence has been given on such count however vicious. But the object of the plaintiff here, is to lay a ground for bringing a new suit, after a full hearing.

Mr. Justice Smith, before whom the action was tried on the 30th June last reported the evidence; and that evidence had been given on the money count, and that upon a full hearing, the jury had found a verdict for the plaintiff for 200 dollars damages.

By the court. The practice has been correctly stated. Tidd's Pract. 590. Dublin ed. 320. It was introduced to serve the purposes of justice, where no evidence has been adduced on the defective count. But here the jury have formed their verdict on the whole matter, and the count is not bad or inconsistent. Granting the motion would tend to harass the defendants.

Motion denied.

JACOB SNYDER and wife *against* SAMUEL CASTOR adm'r. of GEORGE CASTOR, deceased.

On a motion for a rule to show cause, depositions on the adverse side will not be received.

Part of a tract of land could not be levied on by a sheriff legally since the act of 1705, nor since the act of March 21, 1806. Nor could an administrator agree to such a levy.

MOTION for a rule to show cause, why the levy and inquisition held under the execution should not be set aside. The *feri facias* was returnable to July term 1807, and was levied on 30 acres, more or less, of land, situate near the Oxford road, eight miles from Philadelphia.

The lands were condemned by an inquisition, taken in the city on Saturday the 25th July; but when the same was returned into the prothonotary's office did not appear. A bond had been given by the administrator to the sheriff, for the amount of the damages and costs, dated 30th September 1807, payable on the 14th November following, one month before the sitting of the court in Bank. The motion was grounded on the affidavit of the administrator, that the 30 acres levied on, were part of a larger tract of 200 acres, which had been many years in the family of the deceased.

The deposition of George Facundus, the sub-sheriff, was offered to the court on the part of the plaintiff, tending to show an acquiescence in the levy by the defendant; but the court refused the same in the present stage of the proceedings. When the rule applied for is granted

upon proper grounds shown, the adverse party, with his depositions, will be fully heard.

Rule to show cause.

On the hearing upon this rule, it appeared that when Facundus served the execution, it was made known to the defendants, and that he had given him several notices of holding an inquisition upon the land. That he never complained of want of notice; and that the usual mode of notifying the taking of such inquisitions, is by putting up notices in the offices of the prothonotary and sheriff.

Mr. Ingersoll for the defendant urged, that the present levy was in direct opposition to the act of 21th March 1806, 7 St. Laws 566, the 11th section whereof directs, that not less than one whole tract or lot of land, with the appurtenances, shall be levied on, in defect of personal estate; and that notice shall be given of the time of holding the inquisition.

Messrs. Hopkinson and S. Levy for the plaintiff contended, that the present application was merely to effect delay and produce expense. A *venditioni exponas* has issued, returnable to this term; and the sheriff, without proceeding to a sale, has raised the damages, interest and costs upon the defendant's bond voluntarily given. The defendant comes too late; he might have applied at the last July term, erected under the late act of 10th April 1807. 8 St. Laws 249, § 8. Though the judge who then attended, might not be able to decide finally on the supposed error, yet he might grant rules, and make all necessary orders preparatory to the hearing. This is analogous to the case of an executor sued, not pleading judgments against him; when missing the opportunity, he loses it forever. 1 Ld. Raym. 594. A strong case is there put of *Gilburn v. Rack*, 2 Sid. 12, where a judgment of debt was given against tenant in tail, who died, and the lands intailed descended to the issue; a *scire facias* was brought against the heir and terretenant, and the heir warned: and judgment had against him by default, estops him from saying that he was a tenant in tail. The same case is cited in 2 Ld. Raym. 1051. 2 Stra. 732. Where there is error, the party must point it out, and take advantage of it in due time. 2 Ld. Raym. 885. A motion to quash a foreign attachment, must be made at the term to which it is returnable. 2 Dall. 79.

But at most, the levy by the sheriff's officer was only a voidable act. The defendant has acquiesced therein, and by giving his bond, has made the debt his own. A voidable act may be made good by the subsequent conduct of the party. Co. Lit. 215, *a*.

Plowd. 136. An infant seals a lease, but being of full age before the rent day became, and not waiving the land, he was liable for the rent. Cro. Jac. 320, Bull. 177.

The inquisition is directed to be held on the premises in execution by the late act, "if required by the defendant or his agent." He is therefore to do the first act, "of which notice shall be given;" the clause directs the proceeding to be according to the existing laws, referring to the act of 1705, and the notices in the public offices are conformable to the usual practice in such cases.

Mr Ingersoll in reply. The present application is not too late. The inquisition was taken on Saturday evening, and the court sat upon the Monday following. Before any default can be ascribed to the defendant, it should have been shown, that the *fi. fa.* and inquisition were returned at the last July term. It is incumbent on the plaintiff to prove the affirmative hereof; and it does not lie on the defendant to show it negatively.

But if we had then applied, what redress could have been given?

It is admitted, that the judge who sat, could not have decided on the application, but merely make preparatory rules; so that in such case, we should have been precisely in the same state, in which we now are. If there had even been a sale, we might now well move against it, the law being imperative. There is no ground from whence acquiescence can be inferred. The defendant early objected to the improper levy; and though an individual owning the premises levied upon, might have agreed thereto, yet it was not competent to an administrator acting for other persons, to conclude them by such an agreement. The bond was given to prevent all embarrassments on the part of the sheriff, and was recommended by counsel.

Antecedent to the late act, the court would have interposed on such a levy of 30 acres, part of a tract of 200 acres. The sale would have essentially injured the residue of the tract. But the legislature have provided for the very case, and no difficulty can now exist on the subject. Notice is also to be given of holding the inquisition. It must be held on the premises, if required by the defendant or his agent. But there may be a long interval between the time of levy and taking the inquisition. And how is the defendant to be apprised of the latter time? To effectuate the intentions of the legislature, notice must be given to the defendant, when the inquisition is not held upon the land.

By the court. The objection urged against the present application is, that it comes too late, and that there has been an acquiescence in the acts of the sheriff, so as to take the case out of the late law. But

we are far from being satisfied, that the *fieri facias* was returned in July term last; and unless this was the case, there is no ground for the objection. At all events, the sitting judge could not have set aside the levy. It is true, he might have stayed the proceedings, and granted rules preparatory to the final hearing. This however would not expedite the business, but would leave the parties as we now find them.

Giving the bond could be considered in no other light, than as a prudential step under existing circumstances. The administrator could not without a breach of his duty, have assented to an illegal act tending to prejudice those for whom he was intrusted. But we have no evidence of any such agreement.

Under the old act of 1705, this court would not have suffered the levy of a parcel of a distinct tract of land, by the sheriff; because it would tend to defeat the provisions of that law, and would be injurious as well to other creditors as the debtor. The present case is clearly within the words and spirit of the law of 21st March 1806: and consequently the levy, inquisition and *venditioni exponas* must be set aside and quashed.

WILLIAM TURNBULL, JOHN HOLKER and PETER MARMIE, who survived
DANIEL BRITT, *against* JAMES O'HARA.

A judge at Nisi Prius, who determines a question of evidence, but reserves the point, is not precluded from sitting in bank on the argument.

Upon reserved points, argued with a motion for a new trial on the merits, the plaintiff's counsel begins and concludes the argument.

The declarations of an agent may be given in evidence, to corroborate or discredit other declarations which have been proved; but what he has said not acting in his agency cannot be received to establish any independent fact.

New trial will not be granted, where the cause is submitted to the jury on the credibility of testimony: nor where motion is founded on the discovery of evidence, which it was the fault of the party, that he did not produce at the trial.

MOTION for a new trial, grounded on the merits of the case, and on two points reserved.

The cause was tried before Mr. Justice Smith, at a court of Nisi Prius held on the 2d December 1807, when a verdict passed for the plaintiffs for 27,707 dollars and 87 cents; and two questions of evidence were reserved at the trial.

Tilghman, C. J. declined sitting on the argument, having been concerned as counsel for the defendant, unless the same became absolutely necessary for the purposes of justice.

Brackenridge J. was also averse from sitting, having given testimony for the defendant on the trial, and from some peculiar circumstances existing between himself and Mr. Turnbull.

It was then insisted by the defendant's counsel, that Smith J.

could not legally sit on the present argument ; and the case was compared to that of an appeal from the Circuit Court, in the decision whereof it was not competent to the judge who sat in the Circuit Court, to give an opinion.

But the chief justice declared, that the uniform practice both in England and this state had ever been, for the judges who had tried causes, to sit afterwards in judgment on the points reserved.

Yeates, J. concurred therein, and said that previous to the passing of the Circuit Court law on the 20th March 1779, such had been the constant usage, on trials at the Courts of Nisi Prius. 4 St. Laws 362.

Brackenridge, J. afterwards consented to sit during the argument.

The defendant's counsel then contended on the point of order, that they had the right to begin and conclude the argument.

Yeates, J. On a motion for a rule to show cause why a new trial should not be granted, or on a motion for a new trial where the merits are fully gone into, the party moving begins and concludes : but under the 24th rule of practice of this court, in arguing the points reserved, the plaintiff's counsel begins the argument. If the grounds of the motion are separated, we can pursue this order ; but if they are blended together in one argument, in order to save time, I do not see how we can counteract the settled rule of the court.

Smith and Brackenridge, Justices concurred ; and the counsel agreed to make one argument of it.

Smith, Justice, reported the evidence given upon the trial before him. It was very lengthy, and consisted chiefly of depositions, letters, drafts, and other written documents. Mr. Justice Brackenridge alone was personally examined as a witness. So much only of the evidence is detailed here, as will furnish a general idea of the facts, on which the reserved points were founded.

It was an action for money had and received to the plaintiff's use, and was grounded on a special contract made by the plaintiff's with General Henry Knox, in behalf of the board of treasury of the United States, on the 29th May 1787, for the supply of certain rations at fort St. Vincennes, by the 30th June following. At the time of mak

ing this contract, the plaintiffs had the general contract for the supply of the western troops ; and one John Bradshaw was employed as their agent and commissary under that contract. He purchased and laid in the greater part of the rations specially contracted for ; but whether he acted therein for the plaintiffs or the defendant, formed the great subject of dispute. The abstracts were made out in the name of the defendant, and delivered by the commanding officer to Bradshaw for his security. The defendant afterwards received- \$13,833 $\frac{4}{8}$, the amount of the abstracts from the treasury ; and for this sum, with the interest due thereon, the present action was brought.

Each of the parties claimed Bradshaw as their agent, and gave a great variety of testimony in support of their respective pretensions, much of which was contradictory and could not possibly be reconciled. Bradshaw was since dead.

The first reserved point was, whether a certain small book, containing a written statement in the hand-writing of the said Bradshaw, of facts which had taken place as to the furnishing of the rations, and which had been made by him upon a suit which he had brought against one David Duncan, who had been connected with O'Hara, should be received in evidence ? A reference had been entered into in that suit.

This testimony, Judge Smith refused to admit for the following reason. Because he apprehended the said statement was made to be laid before referees in a suit brought by Bradshaw against Duncan ; and it did not appear that it ever was laid before the referees ; if it had, the plaintiffs here had no notice of that action or reference ; nor was it in proof, that if Bradshaw had been their agent as commissary, he had any authority from them to bring the action, or enter into the reference. Besides, the action was brought and supported on the ground, that Bradshaw was not the agent of the plaintiffs, but the agent of the defendant. Shall therefore the statement of Bradshaw in the capacity of agent for the defendant, be given in evidence against the now plaintiffs by the present defendant ? Surely not.

Afterwards in the course of the trial, the plaintiff's counsel offered to give in evidence, a certain letter bearing date June 8th, 1789, from the said Bradshaw to the plaintiffs ; wherein he expresses his wonder, that O'Hara should pretend, he had supplied the rations, inasmuch as his boat with provisions did not arrive at St. Vincennes until September 1787. He deplores his embarrassments, in consequence of his drafts in favor of those who had furnished the supplies, not being honored ; and declares, that he will retain the abstracts until the bill holders should be fully paid, &c. &c.

Judge Smith permitted this letter to go to the jury. Whether this letter was evidence in the abstract, he deemed it unnecessary to give any opinion. But as the defendant had given evidence of Bradshaw's declarations to Judge Brackenridge, this letter was evidence to contradict those declarations; and for that purpose only, he held the evidence to be admissible.

Messrs. Rawle and Hopkinson for the defendant, now contended, that every objection which could be urged against receiving the statement of Bradshaw in evidence, held with equal force against the latter; consequently the decision in either the one case or the other, must have been wrong. The plaintiffs' counsel had without opposition, permitted the verbal declarations of Bradshaw to other witnesses at different times respecting his agency, to be given in evidence; and why should not his written declarations to the same effect be also received? Could any line of discrimination be drawn between such unwritten and written testimony? The plaintiffs considered him as their agent, and in that capacity, his declarations were evidence against them, made either in speech or writing. 1 Stra. 527. 1 Espin. Rep. 142. Any acknowledgment in the hand-writing of the agent is as good evidence as if made by the party himself. 3 T. R. 454. So of one in the employment of another as an usher. 2 Espin. Rep. 692. So confession of an escape by an under sheriff is evidence against the sheriff. 1 Ld. Raym. 190. Even a letter of a nominal plaintiff had been received in evidence. 7 T. R. 668. Bradshaw must be considered either as an agent or a witness. If he is viewed in the latter character, his declarations at other times, may be shown to corroborate or invalidate his testimony.

To this it was answered by Messrs. E. Tilghman and Dallas for the plaintiffs that they fully conceded, that the declarations of a party oral or written may be given in evidence against him; and so those of one who represents him, provided they are made in his representative character. Thus, a master is liable to answer for any damages arising to another, for any negligence of his servant acting in his employ; but not for a willful act of the servant, done without the direction or assent of such master. 1 East 106. No master is chargeable with the acts of his servant, but when he acts in execution of the authority given him. *Ib.* 108. Salk. 282. The plaintiffs objected to the little book containing the statement going to the jury, because it was the declaration of a person not on oath, whom the defendant would consider as his agent; though for the purpose of introducing this testimony he would be willing to call him the agent of the plain-

tiffs for the moment. At the time of making this statement, he was the mere obligee in a bond given by Duncan to him, not the agent of the plaintiffs, nor acting in their service. Duncan had been guilty of a gross misrepresentation to the commanding officer, that O'Hara had paid all the drafts of Bradshaw for the supplies furnished, and had thereby procured the abstracts to be issued in his name, though retained by Bradshaw. He afterwards delivered them up, on receiving a bond to take up certain outstanding bills, and the obligors having made default therein, a suit had been brought thereupon. Could then this unknown statement in an unauthorized action, adverse to the interests of the plaintiffs, operate against them? Could Bradshaw, when he made it, be said to be acting in the capacity of their agent? It has been objected, that we suffered his oral declarations to go to the jury. But how will this avail, in the legal question? Admissions of the parties do not form the law. The propriety of a decision as to evidence cannot possibly be tested by the effect such testimony may have when all the circumstances of the case have been fully developed.

On the second reserved point, there can be no difficulty. If Bradshaw had been examined upon oath, he might have been discredited by his letter, stating contrary facts; *a multo fortiori* where his oral declarations have been shown in evidence by the adverse party. His assertions to two witnesses have been proved by these two witnesses on the part of the defendant; and it was competent to the plaintiffs to show his written assertions utterly repugnant thereto, in order to invalidate the effect of such testimony.

Together with these reserved points, the counsel on each side, on the motion for the new trial upon the merits, went with much ability into a minute detail of the evidence, which had been given; but their several arguments, tending to show that the verdict was conformable or contrary to the evidence, are here omitted, being rendered unnecessary by the grounds of the decision.

Before the argument was closed, the defendant's counsel produced the certificates of two physicians at Pittsburgh, stating the illness of the defendant in the month of October last, which continued with some intermissions until the present month of December; likewise the affidavit of the defendant himself, stating that he had attended the trial of the cause six or seven times; that he was prevented by indisposition from attending at the last court of Nisi Prius, having been ill in October last and continuing ill until the 10th December instant; that for certain reasons, he believed Mr. Justice Brackenridge who was to hold the court of Nisi Prius, would not sit on the trial of

the cause ; that he holds in his possession at Pittsburgh certain bills and drafts, which he now considers to be material testimony in the investigation of the merits of the case ; and that he verily believes, that there is a balance due to him from the plaintiff and not on the other side.

These facts were also urged as grounds of a new trial ; and the largeness of the sum found due to the plaintiffs, and the reasonable probability that justice had not been done by the verdict, were strongly insisted upon by the defendant's counsel. They were answered on the part of the plaintiffs.

The case was continued three days under advisement, and the opinion of the court was delivered by

Yeates, J. The case comes before the court on two points, reserved by Judge Smith upon the trial, accompanied by a motion for a new trial, the verdict being alleged to be against evidence.

The first question which presents itself for solution is whether the small book, containing a written statement made by John Bradshaw, in the suit brought by him against David Duncan, should have been received in evidence at the trial ?

It is headed "Bradshaw's Case," and is without date. It contains in the conclusion the following query : Query, Is not Mr. Duncan liable for damages for breach of covenant ; for damages on protested bills ; for false imprisonment ?

It appears evidently to me to be the state of his (Bradshaw's) case to be submitted to counsel ; and it is admitted that he died before the trial at Nisi Prius.

From a review of the evidence given to the court and jury, previous to the offer of this book, it appears, that the plaintiffs, as well as the defendant, insisted, that Bradshaw, in the supply of rations furnished for that portion of the army, which was to march to Post St. Vincennes, in pursuance of the resolutions of congress, transacted that business, as their agent respectively, and brought forward depositions and other testimony in support of their several adverse allegations. It certainly formed the most material consideration in the decision of the question by the jury.

Was then this written statement admissible in evidence ? It is agreed, that if Bradshaw had been living, and was produced by the defendant as a witness on the trial, he could not be received as such without being sworn or affirmed ; and further, that any declarations either oral or written, which he had made, might be given in evidence on the one side, to show his consistency in support of his testimony, or, on the other side, to discredit it by showing he had spoken differently

of the same transaction. But it has been contended on the part of the defendant, that as the declarations of a party may be given in evidence, so also may those of his agent. If this statement had been made by the order or direction of the plaintiffs, it would be good evidence. But of this there is no proof nor even suggestion. Indeed it was sworn on the trial, that in the suits of Bradshaw against Duncan, and *é contra*, no notice was given to the plaintiffs, or either of them, to exhibit their claims.

If Bradshaw is deemed the agent of the defendant, he could not give his declarations in evidence, made long after the transaction of the business of the agency, so as to affect the interests of third persons. The agency was in June 1787, and the report of the referees in the suit against Duncan was dated 15th March 1790.

That action was grounded on a bond, conditioned for the payment of certain enumerated outstanding drafts, made by Bradshaw, on his surrender of the abstracts to Duncan. Although Bradshaw was then adverse to Duncan and O'Hara, yet his demand was hostile to the interests of the now plaintiffs. The only plausible ground then on which the defendant could introduce this book as evidence is that Bradshaw, when he penned his statement, acted in his representative character as agent of the plaintiffs, and in the line of his consequent duties, and therefore it must be considered as their act. But this I cannot accede to, because he was not then in that capacity; and moreover, the defendant's counsel assume a ground which they have contested *totis viribus* both during the trial and the present argument, as to the agency of Bradshaw in purchasing the supplies. They cannot, for the purpose of giving evidence, affirm and disaffirm a fact in the same breath with any degree of consistency. I am therefore of opinion, that Judge Smith did right in overruling this testimony. It was offered as proof of an independent fact, not in corroboration or deduction of the former declarations of Bradshaw.

The second reserved point is, whether a certain letter, bearing date June 8th, 1789, from the said John Bradshaw to the now plaintiffs, would have been received in evidence?

This letter amongst other things, stated the difficulties Bradshaw was under, in consequence of the protest of his drafts in favor of the persons who furnished the supplies for the expedition to Post St. Vincennes, and his assurance to the bill holders, that he would keep the abstracts until the fullest satisfaction was made to them. It points out, that the abstracts were made out in O'Hara's name, in consequence of Duncan's having wrote to general Harmer, that he had paid all his drafts; and expresses his earnest desire that the plaintiffs should so arrange the business as to enable them to take up his drafts.

Before this testimony was offered, evidence was given on both sides of the declarations of Bradshaw respecting his agency, each party contending that they had severally made out their case, that he was their respective agent. A variety of circumstances, as well as positive proof, were relied on by each of the parties, tending to evince the amount of the bills taken up by the plaintiffs and defendant respectively ; but on neither side was it insisted that they had taken up the whole of the outstanding bills. Judge Smith did not determine the abstract question, that this letter was evidence of independent facts ; but as the defendant had given evidence of Bradshaws declarations, the plaintiffs were at liberty to give in evidence this writing to contradict those declarations. I see no reason to dissent from that decision.

Bradshaw was pressing to wind up his agency. While his bills remained unpaid, the business respecting the supply of rations was *res infecta* ; and upon the same principle, that the declarations of a witness are admissible either to corroborate or impair the force of his testimony, might his expressions, either oral or written, he received during his agency, either on the one hand to strengthen, or on the other hand to take off, the effect of other declarations made on the same subject.

Having thus disposed of the two reserved points, I proceed to consider the general outline of the evidence adduced on the trial. I will not affect to say that I have been able, since the argument, to examine minutely the mass of evidence which was exhibited to the jury. With all my exertions I have found the time allotted to me to be too short to accomplish this object. But I have carefully perused such documents as appeared to me to be most material.

It appeared then undeniably, that in pursuance of a resolution of congress, a contract was fairly made between the board of treasury, through the instrumentality of the secretary at war, with Turbull, Marmie and Co. to supply 300 men with rations for three months, on an expedition to Post St. Vincennes, which was out of the limits of the general contract, to be delivered at such place as colonel Harmer should appoint, on or before the 30th July 1787. It necessarily follows that if the plaintiffs performed their contract, they became entitled to all the profits and emoluments consequent thereon.

The defendants who had obtained the new general contract, was informed by the secretary at war of this special agreement, and wrote for answer, that he had neither right nor inclination to interfere with the plaintiffs. The plaintiffs received a Virginia warrant for \$3000, on account of this special contract, which, not being paid, they afterwards received \$3000 from the treasury board in lieu thereof, and

they gave bond with security, to account for the same with the proper department. This bond was put in suit, and Turnbull obtained a verdict and judgment thereon in his favor.

By the deposition of general Harmer it appears, that the troops were furnished with the stipulated rations for the expedition to St. Vincennes within the time agreed upon, and at the place appointed by him. The abstracts were made out in the name of the defendant, and delivered to John Bradshaw. These vouchers afterwards coming to the hands of the defendant, he obtained payment of \$13,833¹/₄ thereon from the treasury of the union. Whether the defendant was entitled to retain this money, or whether the plaintiffs were entitled to recover it from him, with interest from the time of his receipt thereof, (deducting the \$3000 which the treasury had paid them) became the subject matter of inquiry in this suit, which depended on a single point, which of the parties furnished the rations? Or in other words, whether Bradshaw, who made the greater part of the purchases, transacted the business as the agent of the plaintiffs, or of the defendant?

The just decision of this much disputed question, rests on a great variety of facts and proofs; the minute detail whereof I have found it impracticable to make, amid the hurry of other official duties since the argument; and which if I had been able to effect, I should have deemed unnecessary upon this occasion. It has unfortunately happened, that the testimony of the witnesses is contradictory and irreconcilable, in many material instances. The duty of the jury to reconcile the testimony, and the rules for weighing the evidence, where that cannot be reasonably done, was laid down to the jury, fully from the books.

The charge of the judge on the most careful examination, appears to me, to be correct in all its parts. Except as to the reserved points, the counsel themselves admit, that the case went fairly to the jury. The question submitted most chiefly turned on the credit which the jury would give to the several witnesses.

Of their credibility, the jury were the exclusive constitutional judges. This court will never invade their province; although I trust they will firmly assert their judicial rights, where the principles of law have been violated by a jury however respectable, or where the weight of evidence manifestly preponderates against their verdict. Without the cautious and discreet exercise of the controlling power of the court in proper cases, justice at this day cannot be administered.

The jury have round a verdict for the plaintiffs, after a full

and patient hearing : and the cause was left wholly to their decision, as a mere matter of fact. The judge who tried the suit, is not dissatisfied with their finding : it was not contrary to his charge. It must be a plain case indeed, wherein under such circumstances, as I have mentioned, I should conceive myself justified in giving my voice for a new trial.

The indisposition of the defendant during the trial, I much regret. But the testimony of Judge Brackenridge alone was given in person ; all the rest consisted of depositions and written exhibits. As to the bills and drafts in the defendant's possession at Pittsburgh, which are now supposed by his affidavit to be material, I cannot consider them as grounds for awarding a new trial ; because it was his own fault that he did not produce them at the trial ; and where the party has been in default, he does not bring himself within the rule as to the discovery of new evidence, so as to warrant a new trial. The same remark is referable to the supposition of the defendant, that his cause would not come on to trial, before the judge who was to sit at *Nisi Prius*, according to the routine of official duty.

The sum found due by the verdict is certainly large ; and if there was strong reasonable ground to believe, that injustice had been done, the court would interpose and direct a re-examination of the case. In the language of the late chief justice, when president of the Court of Common Pleas, 2 Dall. 55, 56, " the important right of trial by jury requires, that new trials should never be granted without solid and substantial reasons ; otherwise the province of jury-men might often be transferred to the judges ; and they instead of the jury, would become the real triers of the facts. But whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages, the court will always give an opportunity by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties. "

Applying those rules to the case under consideration, I am constrained to overrule the motion made on the part of the defendant.

Judgment for the plaintiffs.

WILLIAM GOVETT successor to **TENCH FRANCIS**, late treasurer of the Delaware and Schuylkill Canal Navigation, *against* **JOHN REED** and **STANDISH FORDE** (trading under the firm of **REED** and **FORDE**) and **JOSEPH BALL**.

Awards may be set aside for error in law, or manifest error in fact.

Men having a lien, may relinquish it by their conduct.

THIS suit was brought on a note for 2500 dollars submitted by the defendants. It was submitted to reference and the referees awarded to the plaintiff \$4424 and 16 cents costs. Several exceptions were filed to the report ; but upon the argument, all were abandoned, except the one following in these words.

The defendants were entitled to receive from the plaintiff the price or value of a body of land, the exact quantity of which is not ascertained ; but which was admitted by the plaintiff before the referees, to be at least 15 acres and 19 perches, and to have been contracted for by them, at the rate of 57l. 10s. Pennsylvania currency per acre ; and the defendants claimed a credit by way of set off against the plaintiff's demand for the purchase money or value of this land ; which, with interest, would have amounted to almost the whole sum reported by the referees in favor of the plaintiff ; the said referees mistaking the law and the right of the defendants, refused to give them a credit therefor.

Upon examination of the referees, and the evidence which was adduced to them, it appeared that on the 10th April 1792, when this canal company were incorporated, (3 St. Laws 272) Robert Morris was seised in fee of a large tract of land containing 270 acres, through which the canal was afterwards dug, with his consent, he being then the president of the said company.

On the 30th October 1794, Morris mortgaged this land, including the 15 acres and 19 perches in dispute, to the Insurance Company of Pennsylvania, to secure the payment of \$30,000 and interest on the 13th October 1795.

The company had begun in 1793 to work on these 15 acres and 19 perches, which was part of what was called the Hill farm, and the canal dug therein was completed in June 1795.

On the 4th January 1796, Forde and Ball, two of the defendants, were elected directors of the company ; and the former was peculiarly active in superintending the workmen at the canal, and managing the concerns of the stockholders. Forde died before the meeting of the referees, and his death was suggested on the record, before filing of the report.

On the 15th March 1796, at a meeting of the directors of the canal company, Morris and Forde being present as members of the board, a resolution was entered into, that the quantity of Morris's land occupied by the canal should be ascertained by the engineer, in order that a deed might be prepared for the same, at the agreed price of 57l. 10s. per acre.

On the 21st March 1796, a judgment was entered in this court by the Bank of Pennsylvania, for the use of the now defendants, against Robert Morris, for \$20,990.

On the 30th June 1796, at a meeting of the directors of the company, Forde being present, a certificate of the engineer, Mr. Weston, was produced, ascertaining the quantity of land of Mr. Morris, used for the canal in the Hill Farm, to be 15 acres and 19 perches, and in the Springetsbury farm to be 7 acres 69 perches. Whereupon it was resolved, that the treasurer be directed to credit Morris for the amount of his lands occupied by the track of the canal, leaving a balance of \$470, due to him; and afterwards,

On the 29th November 1796, Mr. Morris drew an order for these 470 dollars, at a meeting of the directors, Forde being present, directing the same to be charged to him for his share of tickets in the company lottery; when the same was accepted and the amount credited to him accordingly.

And on the 11th December 1797, Jonathan Penrose, esq. sheriff, sold and conveyed to Standish Forde and Joseph Ball, two of the present defendants, the whole of the 270 acres subject to the mortgage aforesaid, at and for the sum of \$6800, to hold to them as tenants in common in equal moieties, the same having been taken in execution at the suit of the bank of Pennsylvania, as the property of Robert Morris.

And on the 15th July 1800, satisfaction was entered on the mortgage, by the Insurance Company of Pennsylvania.

On this state of facts, Messrs. Levy and Dallas contended, that the report should be set aside.

It is almost wholly a question of law. By the giving of a mortgage, the legal estate is *eo instante* vested in the mortgagee. The right passes thereby; and the mortgagor is in a worse situation, than a tenant at will, who holds under a lease from the mortgagee, granted since the mortgage, without the privity of the mortgagee. Doug. 21, 270, (281.) The mortgagee may support ejectment, as well here, as in England. But still the equity of redemption continues in the mortgagor, which has always been considered as an estate in the land; for it may be devised, granted, or entailed with remainders. And the person entitled to the equity of redemption is considered as the owner of the land;

and a mortgage in fee is considered as personal assets. 1 Atky. 604, *Cosborne v. Scarp*. Hence it follows, that the interest of the mortgagor, subject to the mortgage, may be levied on and sold upon judgments obtained against him; as was done in the present instance, and in various other cases. 4 Dall. 151. The judgment binds the equitable interest of the party, and the creditor succeeds to all his right therein. It is not denied, that a parol contract fairly executed, as far as it may be, before the lands become subject to incumbrances, will be binding on a subsequent purchaser, with notice. But here the lands were mortgaged, before any agreement was made, that the track of the canal should pass through them. The minute of the company of the 15th March 1796, contains no indication of any previous contract for the land; the price of the land is then fixed for the first time. The whole of the mortgage money became due on the 13th October 1795; the judgment was entered on the 21st March 1796, binding the equitable interest of Morris, in the land; and yet this illegal appropriation of the money by way of credit to Morris, in order to save a desperate debt, was not made until the 30th June 1796, in violation of the rights of the judgment creditors. If the damages had been assessed under the 8th section of the act of 10th April 1792, (8 St. Laws 279,) by a writ of *ad quod damnum*, the company must have tendered, or paid the amount to the owner, before any title to the land could vest in the owner. They could not pretend to a set-off. But even at this time, it does not appear that Morris had been credited for the price of this land, further than can be collected from the minutes of June and November 1796. The state of the account, together with the company books, should have been submitted to the referees, as well as this court, for their inspection. Every person is bound to take notice of a judgment, as well as a mortgage, which may affect the party's interest in the land. No reservation was made in favor of the canal company at the sheriff's sale; nor are the vendees bound to make such reservation. By paying off the mortgage they succeed to the rights and interests of the mortgagees, and stand in their place. But it will be urged, that the conduct of Mr. Forde, as one of the members of the board, will justify the application of the money to the credit of Mr. Morris. One having a prior lien, may postpone himself by misconduct. 9 Mod. 37. But it is now settled, that the mere attesting of a deed will not have this effect, unless there be fraud, or actual notice. Bro. Cha. Rep. 858. 3 Bac. 301, (Gwillem's.) We answer hereto, that every order of the board, is that of a majority; and it remains to be ascertained, that Forde concurred in the measure, or was even present at the time. Besides, if at the time he did not know his

legal rights, he shall not be concluded thereby: he was guilty of no willful omission, and could gain nothing by it.

Upon the whole, if the referees have committed an error in point of law, in refusing the set off, and thereby materially injuring the defendants, the court will set aside their report. The court will go beyond the rule of set off, when injustice would otherwise be done. 4 T. R. 123, *Mitchell v. Oldfield*.

Messrs. Ingersoll and Condry answered, on the part of the directors of the canal company.

This court will not interpose, unless they are satisfied that there has been manifest error. The plaintiff's demand is undisputed and it is incumbent on our adversaries to show themselves clearly entitled to a set off. The case of *Mitchell v. Oldfield* depended on the exercise of the summary powers of the court, and is not applicable. Besides Lord C. J. Ellenborough in a later case, expressed a strong disinclination to extend the power of setting off debts, on general grounds of equity, beyond the line which the legislature had thought proper to mark out. 3 East 150.

Here the canal company contracted for this land previous to the mortgage and subsequent judgment. They began to work in 1793, and Mr. Morris being indebted to them for stock, it was considered mutually, as so much money paid on account of the purchase. The insurance company were notified of the agreement by the publicity of the work done by their people on the land; and if Morris had sold the land instead of mortgaging it, his vendees would be bound by the contract, on the consideration money being paid. Large sums of money had been expended in digging the canal through this land, with the assent of Mr. Morris while he was president of the company, and deeply interested in the undertaking. He had a lien on the land, which he might relinquish, but he could not rescind the contract, which he had maturely entered into. When one contracts to sell lands, the consideration money becomes personal estate. 2 Vez. 640. Even as to mortgages, they have ever been considered as personal assets. Executors or administrators only can sue for them; and the husband of a feme mortgagee, may release the right of his wife, without her concurrence: the interest of a mortgagee has never been levied on under a judgment. What stronger traits can personal property exhibit of its true nature?

The effect of mortgages here differs from those in England. With us, they are viewed as mere pledges to secure the payment of the money; and another debt cannot be tacked thereto. 1 Dall. 142. A third mortgagee cannot squeeze out a second, by buying in a first mortgage. Morris might well have insisted that Forde and Ball should

discharge the mortgage to the insurance company, and of course those claiming under him had the same right. The title of the canal company relates back to the time of the contract. On the 15th March 1796, which was six days before the judgment, nothing remained to be done except the admeasuring the land with accuracy, Morris being indebted largely to the company. What interest then, was there to be bound by the judgment? Only \$470 remained unsettled for, which was discharged in November following, with the full concurrence of Forde, who in the character of an agent, completed the contract. He was present at this meeting, and must be supposed to have assented thereto, unless the contrary be shown.

It is idle to say, that the sheriff's vendees succeeded to the supposed rights of the mortgagees. They claim by no assignment, but were bound by the terms of sale to pay off the mortgage. As to Morris and those claiming under him, it is precisely the same, as if the premises had been struck off at \$36,800.

Independently of these radical objections to the present motion how can this pretended set-off be sustained? The suit is brought against Reed, Forde and Ball, jointly; and any debt, if due to Forde and Ball, cannot be set off against it. Forde also died before the reference met, and Ball could not set off his debt without the concurrence of his executors, who might possibly wish to retain this *scintilla* of claim to the 15 acres and 19 perches in his minor children. Besides the making of a paper title and payment of the consideration money are concurrent acts. Ball, it is true, might release his interest to an undivided moiety; but what becomes of the other moiety during the minority of Forde's children? Has any deed been made, or tendered, whereon a pretence of set off could be plausibly maintained? A full complete remedy is open to Ball and the children of Forde, if they have a title to the lands, by recovering the possession in an ejectment.

This court will not set aside the report of referees, unless a clear and palpable mistake has been committed either in law or fact, tending to manifest injustice. And such have been their uniform decisions. 1 Dall. 486. Motions like the present are similar to those made for new trials. 2 Dall. 55, 57, 58, 121. 4 Dall. 391.

Tilghman, C. J. after stating the several facts, delivered the unanimous opinion of the court.

The defendants in support of their exception to the award, contend, that their judgment of the 21st March 1796, was a lien on the interest of Robert Morris; and consequently, that they had a right to receive from the canal company, the whole purchase money agreed to be given by them

for the 15 acres and 19 perches, which at that time, was neither paid to Morris nor placed to his credit in account with the canal company. It appears, that there were on the 21st March 1796, and long before, accounts subsisting between Mr. Morris and the canal company ; but of the state of those accounts we are not well informed.

Several other points were also made and elaborately argued, concerning which, the court think it unnecessary to give an opinion : neither do they mean to intimate any opinion, whether a judgment creditor, whose debtor has contracted to sell his land before the judgment, but had not conveyed it, has any lien on the unpaid purchase money. The present case turns upon its own particular circumstances. For even if the defendants had the lien they contend for, it was in their power to relinquish it.

The referees seem to be of opinion, that they did relinquish it ; and the court cannot say, that they were wrong in their conclusion, since it was proved to them, that one of the defendants was present at meetings of the board of managers, when the money now claimed by them, was ordered to be placed to the credit of Robert Morris. If they gave their consent to these orders, it certainly amounted to a waiver of the claim now set up ; and if they did not consent, they might have given some evidence of their dissent. This is a fact of which the referees were judges. The principles on which the court proceeds, with regard to exceptions to awards, are well established. They will set aside an award, for error in law, or manifest error in fact. The law, as to the present exception, depends on the fact of the defendant's having consented to have this money placed to the credit of Robert Morris, in account with the canal company. If the referees were of opinion that such consent was given, the court are so far from thinking they were manifestly wrong, that it appears to them, they decided according to the weight of the evidence.

The judgment of the court is, that the report be confirmed.

ROBERT WALN, indorsee of **ISRAEL WHEELLEN**, indorsee of **WHEELLEN** and Miller *against* **JOHN WILKINS** and **THOMAS DUNCAN**, esquires.

A set off must be between the same parties. New trial not grantable, on the ground of new evidence, which it was the fault of the party or *cestui que use*, not to have produced upon the trial.

MOTION for a new trial, on the part of the plaintiff.

The cause had been tried before Mr. Justice Smith on the 3d July

1807, at a court of Nisi Prius held for Philadelphia county, and the defendants obtained a verdict. It was formerly tried before the whole court in Bank, on the 13th December 1804, when a verdict passed for the plaintiff. A rule having been obtained to show cause, why a new trial should not be awarded, the same was made absolute, after full argument in December term 1805.

Smith, J. reported the evidence given upon the last trial. He submitted two questions of fact to the jury. 1st. Whether, under all the circumstances of the case, the note in question was intended by the parties thereto, as an accommodation note. 2dly. Whether, even supposing it be an accommodation note, the plaintiff had paid a valuable consideration therefor, in a fair course of trade; because if the fact was otherwise, and the indorsement had been made merely to save a desperate debt, the plaintiff was not entitled to recover. On the last point, the defendant's counsel gave written notice to the plaintiff to produce his books upon the trial. This was complied with, and the following entry appeared to have been made in the books of Mr. Waln.

| | |
|---|---------------|
| “ December 13th 1804. Dr. Israel Wheelen for check paid | |
| “ Jared Ingersoll, esquire, 13th instant, in suit against | |
| “ Wilkins, - - - - - | 37l. 10s. |
| “ Do. for \$7 and 12 cents for jury's expenses, | 2l. 31s. 5d. |
| | <hr/> |
| | £. 40 3s. 5d. |

This testimony was not adduced upon the former trial. With the present verdict he was not dissatisfied, but thought justice had been done.

The motion was grounded chiefly on the affidavit of Martha Powell. She declared on her affirmation, that “ in the latter part of 1796, a large sum of money was due to herself, her sister Anne, and Josiah Hewes from Wheelen and Miller; that on the affairs of that house getting into disorder, they became uneasy, and demanded payment or security. Whereupon it was agreed between Wheelen and Miller, William Montgomery, George Bickham and Robert Waln, that the said money should be secured under certain judgments given to them by Joseph Miller to secure their advances for Wheelen and Miller; that afterwards the note of the now defendants was indorsed by and deposited by Israel Wheelen with Robert Waln, for the purpose of paying or further securing the payment to the said Martha, Anne and Josiah; that she has since received part of the amount due to her, and has assigned the residue to her sister Anne Powell

without recourse to her, and is now wholly disinterested in the event of this suit, but there is yet due to the said Anne Powell, and Josiah Hewes more than \$4500, of the debt aforesaid; that she was present at a meeting between the said Montgomery, Bickham, Hewes and Wheelen, respecting the debts due from Wheelen and Miller to them, when it was stated by Montgomery and Bickham, and there was due and unsatisfied for their advances to Wheelen and Miller considerable sums, which statement was assented to by Israel Wheelen."

Messrs. Rawle and Morgan for the plaintiff, did not go into the merits of the cause, but contented themselves with observing, that where a verdict is given against evidence, the court will exercise their legal discretion, as to awarding a new trial. It is not asserted, that the verdict is manifestly wrong; but here have been contradictory verdicts, and the testimony of Martha Powell affords a ground for a new trial. She was not a competent witness at the former trials, but has released her interest since. The plaintiff could not compel her to qualify herself earlier as a witness, though he was well aware of what she could prove. On the last trial, it was much relied on, that considering the note to have been given for the purposes of accommodation, the plaintiff was a trustee for Wheelen; but the testimony of Miss Powell, shows that he was a trustee for specific creditors and third persons being interested therein, they ought not to be affected by the conduct of their trustee. There was no impropriety in the entry extracted from the plaintiff's books, charging the sums paid on the first trial to Wheelen. The plaintiff held the note as a security for his advances, and he was only responsible for the nett proceeds. We stand on the same ground as upon the former trials, and have not changed it. If the testimony of Powell disagrees from Wheelen's, let another jury judge of their relative credibility.

The plaintiff had been taken by surprise. When the court awarded a new trial in December 1804, they did not express their reasons lest it might prejudice the cause on a future investigation; and the counsel received notice from their adversaries to produce proof of the consideration paid when the note was indorsed, which was afterwards waived, as proceeding from the mistake of the clerk who delivered it. This was not inserted in the specification disclosing the grounds of defence; and by these means, the plaintiff came on to trial, unprepared to establish facts highly material in the investigation of the true merits of his case.

Messrs. E. Tilghman and M. Levy for the defendants, went

more fully into the evidence ; but their observations thereon are herein omitted.

It is agreed, that the cause went fairly to the jury, under the charge of the court. It is not said, that the verdict was against evidence, but that the evidence was ambiguous. This however is no ground for ordering a new trial ; nor that a contrary verdict has heretofore been given, which was set aside unanimously by the court. The reason of setting it aside could not be mistaken, as the foundation of the defence rested on the point, that it never was designed as an accommodation note. The arguments upon the motion for the new trial were directed almost exclusively to this question. The defendants were under no obligation to give notice to the plaintiff, that he must prove himself a fair indorsee for valuable consideration, and thereby put him on his guard. If he claimed the money as under an accommodation note, his counsel well knew that the law imposed this necessity upon him.

Much stress is and on evidence discovered since the last trial, as is said with respect to the testimony of Martha Powell. When she indorsed the note to her sister, does not appear by her affidavit. If it was before the last trial, the ground wholly fails, because then she might have been called a witness ; but if it was subsequent thereto, she should have removed her disqualification in proper time. It is admitted that the plaintiff knew what she could prove. Why then did he not bring her forward ? Sunday intervened during the trial, during which the plaintiff's books were examined. When on Monday, it was urged that the plaintiff was a trustee for Wheelen, from the entry discovered in his books, on which so much reliance was placed, why was not she then examined ? Who shall suffer for the neglect ? It is evident that the cause was tried at the expense of the plaintiff, or of any specific creditors, but of Wheelen himself.

During the former trials, it was contended, that the plaintiff was induced to take the indorsement by the conduct of Mr. Duncan himself ; and Wheelen was adduced to show, that it was made to him to secure his own advances. Miss Powell affirms, that it was made to secure other specific creditors, and thus converts the person who has always claimed the money in his own right, into a mere trustee for others. No one can be permitted to change his ground in this manner, and thus blow hot and cold at the same time. If Mr. Waln is interested at all in this note, and Martha and Anne Powell with Josiah Hewes were only concerned therein to the amount of \$4500, it necessarily follows that the plaintiff's interest was fairly tried by the jury, and their decision upon the whole matter, was perfectly just.

Tilgham, C. J. did not sit during the argument, he was formerly of counsel in the case.

Yeates, J. delivered the opinion of the court as follows:

The present motion is not founded on any supposed misdirection of the judge, who tried the cause, to the jury; nor has it been alleged, that the verdict given for the defendants, was manifestly against evidence. But it has been contended, that it was obtained by surprise on the plaintiff at the trial. This surprise, it is said, has been in some degree occasioned by the courts' omitting in December term 1805, to express the grounds on which they awarded a new trial.—I cannot accede hereto.

The plaintiff's claim was attempted to be repelled on the first trial, under a supposition, that Wheeler and Miller owed a larger sum to Wilkins and Scott; and it was also insisted, that the note in question could not be considered as an accommodation. On the first ground, the court without hesitation declared, that the set-off was not sustainable by law; because the debts were not mutual, and between the same parties. Mr. Duncan had no interest in the firm of Ernest and Co., to pay a debt demanded of him, with their money. This would be doing injustice to Mathew Ernest and Charles Wilkins, two of the members of that firm, who were not concerned in the present transaction.

The defence was afterwards conducted on the principle of its not being an accommodation note, which was combatted by the plaintiff's counsel.

The charge of the court was conformable thereto, and the arguments on both sides were stated to the jury. Upon the argument on the rule to show cause, the same question was again taken up; and the court expressed their unanimous opinion, that there was reasonable ground to doubt, that justice had not been done, but refrained from going into further particulars, as the enumeration of them might tend to prejudice the plaintiff on the second trial. Upon what point, could the judgment of the court have been founded, except on the character of the note? We were fully satisfied, that it was not an accommodation note, but was bottomed on a real purchase of lands, and given for the indemnity of Wheelen and Miller; which Wheelen, during his difficulties did not think of raising money upon, from the summer until December 1796. It was a large note, not divided as the notes of Wheelen and Miller were, drawn by persons living at great distances from the city, and in different places, payable 11 days earlier than the three notes, so that Wheelen and Miller should be in funds, to meet the payments on the 3d March. Besides it was not between the same parties, so that Duncan could have no benefit thereby, if his note might be negotiated

and the moneys paid thereon should not be applied in discharge of the contract for the lands.—I have seen no reason, after the fullest reflection, to alter the opinion which I then formed.

But if even it should be considered as an accommodation note, it was incumbent on the plaintiff to show that it came from him in a fair course of trade, that he had paid a valuable consideration for it, and that there was no trust whatever for Wheelen in the indorsement. This was gone into fully on the last trial, and the books of the plaintiff were strongly relied on, to show that Mr. Waln was a trustee for Wheelen, or his creditors. The point was correctly stated in my idea, by Judge Smith to the jury, and left to their decision, together with the question, whether by the fair understanding of the parties, it was intended to be an accommodation note, or not. The jury have found for the defendants: but whether they formed their judgments on the one or other of the points, does not appear to the court.

It has been urged, that the plaintiff is furnished with the evidence of Martha Powell since the last trial, of which he is desirous to avail himself. It has been determined, that where testimony is not known at the trial, which will throw light on the cause, the court will grant a new trial, where there is no default in the party. It is acknowledged, that the plaintiff knew here, what she could prove; but that she did not become a competent witness, until she assigned her interest in the money due to her from Wheelen and Miller to her sister Anne Powell without recourse.

I forbear to say any thing of her materially contradicting the testimony of Israel Wheelen.

But whose fault was it, that Martha Powell was not examined upon the last trial? It can be imputed only to the plaintiff or Miss Powell.

If to the former, he cannot derive a benefit from his own default. When he deemed his case sufficiently strong to go to trial, under the testimony he was then possessed of, he must be supposed to be liable to all consequences. But if the fault be imputable to Martha Powell, she must be considered as the *cestui que use* of such proportion of the note, as according to her affidavit, she was entitled to under the indorsement. As far as appears, she took no active part in the cause from 1797, until 1807, though she must necessarily be supposed to have known, that the action was going on. Ought she not to have removed her disqualification earlier, if she was willing to be affirmed as a witness? Shall a party interested lay by, while a suit is carrying on in the name of another, and the latter avail himself of the neglect of the former, in not releasing her interest, and thereby render herself

a competent witness? In my idea, the same principle, which is applicable to the plaintiff, will also operate against such *cestui que use*.

The judge who tried the cause has not expressed any disapprobation of the last verdict; and therefore under all the circumstances of the case, I have no hesitation in saying, that the motion on the part of the plaintiff for a new trial should not be granted.

Smith J. concurred.

Brackenridge, J. Upon the first trial, I declare, that I thought the question, whether the note was of accommodation or of indemnity, was mere matter of law; upon which the opinion of the court should have been explicitly given to the jury; but I was overruled by the other members of the court. I still retain my former opinion, that it was a question of law, and that the judge should have charged the jury accordingly. But I am decisively of opinion, that it was not an accommodation note, and that a new trial ought not to be awarded.

Motion denied.

THOMAS PRATT, indorsee *against* NAPTHALI PHILLIPS.

Verdict set aside after a full trial on the merits, there having been no plea or issue entered.
But the court made a rule to plead in two days.

ON motion, the court set aside a verdict which the plaintiff had obtained in this cause at the last court of Nisi Prius, though there had been a full trial on the merits, no plea or issue having been entered in the suit. The court made a rule on the defendant to plead in two days.

Mr. Ingersoll, *pro quer.*

Mr. Philips *pro def.*

ROBERT SMITH and MATHEW PEARCE, who survived JOHN CRAIG, assignees of JAMES YARD, a bankrupt, *against* JOHN ODLIN.

Indebitatus assumpsit will not lie for an insurance premium. A parol insurance is valid. *Semble.*

Though a judge on the trial should declare that the evidence did not support the action, it is no ground for a new trial unless he persists in that opinion.

THIS cause was tried at the last court of Nisi Prius in the city, on the 5th December last, before Mr. Justice Brackenridge, when the jury found for the plaintiffs \$2151 and 93 cents, on the following facts, which appeared by the report of the judge.

On the 15th August 1801, an agreement was made between Yard and Odlin, wherein after stating that they contemplated a voyage to be performed on their joint account, it was stipulated that the former should furnish \$24,827 and 56 cents and the latter 12,413 and 78 cents for their advances on the brig Paragon and her cargo ; Odlin was to go as consignee, and receive a commission of 5 per cent.

On the 24th August 1801, Yard made an insurance on his own account on \$4500 at a premium of 12½ per cent, and on the 11th November following on \$11,700 at 16 per cent. These policies he lodged in the month following, before his bankruptcy, with Clemen Biddle, an insurance broker, with orders to have assignments drawn thereon to Odlin. The assignments were drawn accordingly, but were not executed by Yard ; who shortly after sailed to Spain.

An assignment was made by James Yard to the plaintiffs of all his effects, on the 18th December 1801. On the 22 January 1802, a commission of bankrupt issued against him ; and he obtained his certificate of conformity on the 24th March following.

On the 24th April 1805, an interchange of accounts took place between Yard and Odlin, but without prejudice to the parties upon the present demand. The defendant was charged therein with \$6204 received by him as consignee on the voyage, and also with \$3103 and 44 cents for a premium on \$9310 and 44 cents on his share of the brig at 33½ per cent, leaving a balance of \$2151 and 93 cents due from Odlin in case the charge of the premium was correct.

Yard, having released to the assignees his share of the surplus, was examined as a witness. He testified, that previous to the brig sailing on her voyage, he accompanied Odlin to one of the insurance offices in the city, to effect an insurance on Odlin's interest of one third in the property ; and that on a demand of 40 per cent premium being made they thought it unreasonable, and Yard dissuaded him from acceding

to those terms. He proposed to him, that he (Yard) would become his insurer at 25 per cent and cover the premium at 33 $\frac{1}{3}$ long covering premium. This was acceded to ; and they settled their accounts accordingly, the defendant being charged with the premium and receiving a check for the balance of \$93 and 32 cents which was duly paid. This balance upon examination of the account should have been \$99 and 32 cents, but how the error occurred was not explained.

The defendant in order to discredit the testimony of Mr. Yard, adduced a captain Joseph Wildes ; who testified, that when the embarrassment of Yard became public, he carried a letter from the wife of the defendant to him requiring him to deliver up the policy of insurance which he had engaged to effect for her husband ; and received for answer, that it was very accurate, that the insurance was not yet affected but he would have it done.

Yard, on his cross-examination, did not recollect Wilde's calling on him with this letter ; but it appeared, that the meditated assignment recited, that Yard had assumed to insure for Odlin, and that the assignment was intended as an indemnity to him, in case a loss should happen.

And it also appeared, that Yard required of his assignees, shortly after his bankruptcy, to effect a further insurance for Odlin ; and that in consequence thereof, the sum of \$12,600 and 80 cents was procured by them to be underwritten, for and on account of him.

The voyage contemplated by the agreements of 15th August 1801, was from the port of Philadelphia to Porto Cavallo on the Spanish Main, and from thence to some other port in Spain ; the insurance on the first voyage meditated an indemnity against the usual risks attending fair American trade ; and on the second voyage the further risk of capture by any of the belligerent powers. The brig sailed and completed her voyage safely.

This suit was brought to December term 1802, and the declaration was filed for money had and received ; upon the trial, two questions were made.

1st. Whether evidence of a parol insurance would support a demand for a premium ; or whether evidence of a written policy, or instrument in the nature of a policy, must be produced ; or evidence given of its having existed ?

2d. Whether the evidence adduced by the plaintiffs in this case, was sufficient to support their declaration ?

Upon the trial, Judge Brackenridge expressed an opinion, that the plaintiffs had not made out their case ; but he would not now declare his dissatisfaction with the verdict.

Since the verdict, a motion for a new trial was made, on an addi-

tional ground, that the verdict was contrary to law, evidence, and the charge of the court.

Mr. Levy, argued for the defendant, in support of the motion.

This is the first time, that the validity of a parol insurance has been insisted on, in the United States. The novelty of the case furnishes a strong argument against it. Few or no authorities are to be collected from our books, in such an action. We must be contented to reason from analogy, and the inconveniences resulting from suits of this nature.

Insurance is a contract, whereby one party, in consideration of a stipulated sum undertakes to indemnify the other, against certain perils or risks to which he is exposed, or against the happening of some event. The insurer subscribes his name as the foot of the policy. 1 Marsh. 1. The statute of 43 Eliz. c. 12, "concerning matters of assurance used among merchants," points evidently to written policies; and directs that certain commissioners shall hear and determine them. 2 Ruff. stat. 718. And the act of congress of 6th July 1797, c. 11, § 1, prescribes the stamp duties payable on every policy of insurance, or instrument in nature thereof. 4 U. S. Laws 20.

The setting up of verbal insurances would evade all statutory provisions on such instruments. A report of referees has been set aside in this court, because the charge of premium and commission for making an insurance had been allowed, without requiring the policy to be produced, or any proof of its being lost: and this is laid down broadly, to be the only evidence, that in such cases can be admitted in any court, either of civil or common law jurisdiction. *Williams v. Craig*. 1 Dall. 316. In *Master v. Miller*, Mr. Justice Buller says, "till the late act was made, requiring the name of the person interested to be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it." 4 T. R. 342. It will not be contended, that this could be done on a parol insurance; or that a suit might be maintained by an indorsee, on a promissory note or bill of exchange, merely verbal in themselves.

Parol insurances are productive of every species of fraud and perjury, combined with uncertainty. The aspect of written instruments does not change; but impressions on the memories of the best and most intelligent men fade and vary. Can it be expected that warranties can be accurately ascertained by parol testimony? Where there is no written contract, are the 30 days to elapse, after the notice giv-

en of the loss, before the indemnity can be demanded? Is the usual deduction of 2 per cent to be made in such cases?

But even admitting the validity of a parol insurance, the evidence did not maintain the form of action. The agreement of August 1801, contained a general estimate of the intended voyages; and the accounts were not sufficient evidence to support a suit for the premium. *Indebitatus assumpsit* supposes a pre-existing debt, on which the promise to pay is grounded; and it is said to lie in no case, except where debt lies. If the demand of the plaintiffs was recoverable, they should have declared in special assumpsit.

It has been attempted to be shown, that the verdict was against law. It is also contrary to evidence, and the charge of the court. Mr. Yard admitted, that his memory was bad; and this was strongly exemplified upon the trial. He forgot the transaction with Wildes, he cannot show why his check was drawn for \$93 32 cents, instead of \$99 32, the true balance, which he declared he had paid. The case demands reconsideration. Why shall Yard obtain an insurance on his own property, at 12½ and 16 per cent. yet without any other testimony than his own oath, charge his partner 33½ per cent. for the same risks?

Mr. Rawle, for the plaintiffs. It is not pretended, that parol insurances are intended with the same degree of certainty and precision as when contained in written policies; nor is there any danger of such verbal engagements of indemnity being brought into general practice. The question is not, whether written or unwritten insurances would most conduce to the interests of a commercial county; but whether if a parol contract of indemnity is proved really to have existed, the parties thereto would not be mutually bound thereby?

It is not essentially necessary, that policies should be in writing; nor was it so formerly in France. 1 Emerg. 26. At this day, a parol insurance under 100 dollars, is good; but we have no statutory provisions either in America or Great Britain, on this subject. The statute of 43 Eliz. c. 12, does not enact, that policies shall be in writing, though it is admitted to be the usual mode of transacting the business of insurance. It does not however follow, that where the indemnity is by parol, it, shall be invalid. We have no positive institutions interdicting a person from binding himself by an express promise in words only, for an honest consideration. It is true, one who subscribes his name to a policy, is thereby denominated an underwriter; and the fact of insuring is thereby easily susceptible of proof; but no one is prevented from recurring to the proof of an oral engagement of indemnity, if he chooses to run that risk. An insurer would not be allowed to object the want

of a written subscription, as a ground of non-payment, in the case of a loss. And why if no loss has happened, shall the insured in such a case, evade the payment of the stipulated premium? The contract must bind on both sides mutually, or not at all. If one undertakes to insure for another, and does not, he will be liable in an action, to such damages as would be recovered from the insurers. And so in the case of a correspondent, abroad, ordering his agent in this country to make an insurance, which he neglects to make. Vide 4 Bro. Cha. Rep. 488. In *Williams v. Craig*, the plaintiff wrote to the defendant, that he had effected insurance for him; but gave no proof whatever of his having so done. And as to the *dictum* of Buller, which has been cited, it is clear, that the law merchant is a law of good faith; and an act stipulated to be performed, will be considered as done. The parol acceptance of a bill of exchange is equally binding, as if the party on whom it was drawn had subscribed his acceptance. But the case of the plaintiffs depends not solely on parol testimony. The extent of the warranty is defined by the written agreement. The voyage, interest, risk and premium are expressed in the accounts, which the defendant has signed. This is tantamount to a policy, wherein no particular form is necessary. The only real question between the parties is, did the person who is now become bankrupt, become the insurer?

The suit for money had and received, was brought to recover monies which had been received by Odlin, as the consignee of Yard. When the accounts were interchanged on the 24th April 1805, subsequent to the commencement of the action, the defendant admitted by his signature, that he had received 6204 dollars of the proper monies of the bankrupt, and was entitled to certain credits. Every article of the account was amicably adjusted, except the charge for the premium, and the balance struck without prejudice. If the estate of Yard, was credited with the item of premium, it would necessarily augment the balance due from Odlin.

In an action by the insurer for money had and received to his use, against the owners, it was objected, that this action would not lie for premiums against the insured themselves. Lord Mansfield thought the objection came too late, and would not enter into it, when the jury were ready to give their verdict; although he seemed to think there was nothing in the objection. *Gist v. Mason*, 1785. Park. 26, (29, 1st edit.)

It is admitted, that the judge told the jury, the case had not been made out on the part of the plaintiffs; but he will not now undertake to say that he thinks the verdict wrong. The cause went to the jury, on the credibility of Yard's testimony, of which

they were the sole judges, and a broker has been admitted to give evidence of the instructions he has received. 2 Dall. 300. The honesty of Yard was not questioned; the correctness of his memory only was impeached. An error of six dollars might occur in the settlement of an account, and the transaction of Wildes's having delivered him a letter, might have escaped his recollection; but the recital in the assignment, and his request to his assignees to make a further insurance for the defendant, which was effected accordingly, strongly corroborate the testimony which he has given. In every view of the case, it was highly proper, that the jury should exercise their judgment upon it.

The argument which has been urged from the act of congress, laying a stamp duty on written policies of insurance, has no weight. The same objection might be made against proving any debt by parol testimony; inasmuch as bonds and promissory notes, which are proper evidence of debts, are also made liable to certain stamp duties, by that act.

Tilghman, C. J. This is an action of *indebitatus assumpsit* for money had and received, which was tried before Judge Brackenridge, and a verdict found for the plaintiffs for \$2151 and 93 cents.

It appears from Judge Brackenridge's report of the evidence, that Yard and Odlin were owners of the brig Paragon and her cargo, in partnership. Yard's share was two-thirds, and Odlin's one-third. Before the brig sailed, Yard, who was sworn as a witness in the cause, says, that he went with Odlin to one of the insurance offices, to effect an insurance on Odlin's one-third. The premium asked at the office, was, in the opinion of both of them, too high, and he advised Odlin not to give it: he offered, if Odlin chose, to insure for himself at 25 per cent., and cover the premium at 33 $\frac{1}{3}$ long covering premium. To this Odlin consented, and their accounts were settled, Yard having charged Odlin with the premium, and paid him the balance of the account. The brig was bound on a voyage from Philadelphia to a port on the Spanish Main, and from thence to a port in Spain. Odlin was captain and consignee, and had power to sell Yard's share of the cargo, for which he was to have a commission. No written policy of assurance was signed by Yard; but it appeared by a writing signed by Odlin, that the insurance to be made by Yard, from Philadelphia to a port on the Main, contemplated the usual risks of fair American trade; that from the Main to Spain contemplated the hazard of capture by any belligerent power. These transactions took place about the middle of August 1801; soon after which the brig sailed on her voyage, which she completed in safety.

After she sailed Yard procured some insurance on the voyage from the Main to Spain, and about December 1801, stopped payment. In the same month, he lodged the policies which he had procured, with Clement Biddle, with directions to draw an assignment to Odlin. The assignment was drawn, but owing to Yard's hurry he forgot to execute it; and not long after, he went to Spain to transact the business of the estate at the request of the assignees. The assignment recites, that Yard had assumed to insure for Odlin, and that it was intended as an indemnity to Odlin in case of loss. Yard, soon after his insolvency, requested his assignees to procure further insurance for Odlin, and they did procure an insurance in the name of Odlin, for \$12,600 and 80 cents. This was the substance of Yard's testimony, on which the plaintiffs rested their cause.

The defendant, by way of invalidating the testimony of Yard, produced a witness by the name of Joseph Wildes, who swore, that when Yard's insolvency was known, he called on him with a letter from Mrs. Odlin, requesting him to deliver the policy of insurance which he had undertaken to procure for her husband; that Yard said it was very accurate, the insurance was not yet made, but he would have it done. On Yard's cross-examination, he appeared to have forgot the circumstance of Wildes' calling on him. The defendant also proved, that the sum, which Yard said he had paid for the balance of the account in August 1801, was six dollars different from the actual balance; and from this, and other circumstances not necessary to detail, it was concluded that Yard's memory was too defective to rely on.

The credit due to Mr. Yard's memory (for his integrity was not impeached) was a matter of which, under all circumstances, it was proper for the jury to judge. If they relied on it, and it seems they did, there can be no reason for a new trial on that ground.

But the defendant's counsel brought forward two exceptions to the verdict, founded on points of law:

1st. That in an action for money had and received, the plaintiffs could not recover the premium of an insurance.

2d. That a parol insurance is void.

1st. There can be no doubt but the principle is just, that an *indebitatus assumpsit* for money had and received, is not the proper form of action for recovering a premium of insurance.* But to this objection it has been answered, that this action was not brought to recover the premium which was settled in the account of August 1801, if Mr. Yard's evidence was correct: but to recover money, which the defendant had afterwards received as the agent of Yard. A communication had taken place

* *Indebitatus assumpsit* will lie for the premium of a policy. 2 Lev., 158.

between the parties pending the action. Odlin claimed an allowance for the premium, which he alleged had been unjustly retained by Yard, because he had not effected an insurance for him. It was at length agreed, that Odlin should pay so much of Yard's claim as would balance the account, deducting the premium, the amount of which should remain subject to dispute. Both parties came to trial prepared to contest the real object of dispute upon its merits ; so that the objection as to the form of action is not to be favored. I think, the explanation offered by the plaintiff's counsel is a sufficient answer to the objection. Yard swore, that the premium was settled in August 1801. Whether he was accurate in that was matter of consideration for the jury.

2. As to the validity of a parol insurance I do not mean to give an opinion ; because, I do not think it necessary for the decision of the point before the court. The question is, whether Yard was entitled to the premium, which is the subject of dispute. Taking the evidence altogether, I think it leads to the conclusion, that Yard was to keep Odlin indemnified from the risks mentioned in the writing signed by Odlin. This he might do, either by underwriting a policy himself, or by procuring others to underwrite. If he did not do one or the other, Odlin might support a special action on the case against him. Yard being thus responsible, there is no reason why he should not retain the premium, which was the price of his responsibility.

It was mentioned as an additional reason for a new trial, that the verdict of the jury was against the charge of the court. It is true, that the judge in his charge did incline to the opinion, that the action was not supported by the evidence, and this would have very great weight with me, if the judge, after reporting the evidence, had not declared, that upon reflection, he would not say, that he was dissatisfied with the verdict.

Upon the whole, I am of opinion, that the defendant has not shown sufficient cause for a new trial.

Yeates and Brackenridge, justices, concurred.

Smith, J. As the chief justice has stated the facts correctly, I will not repeat that statement. But as I cannot concur in the opinion which he has delivered, it is incumbent on me to state the reasons of my dissent. I know that my brothers do not suppose me capable of differing from them, by an affectation of singularity, or with a view to court popularity, or to avoid the reverse on popular questions. When I am compelled to differ from the majority of the court, it becomes me not to be arrogantly confident in my own judgment ; but such as it is, I must be

guided by it. . I am the less diffident of it because it very generally leads me to concur with my brothers.

Although the action for money had and received, is not the proper action to recover a premium of insurance, yet I would be willing to join in the refinement, by which the rest of the court overcome that objection ; because a judge ought never to turn a plaintiff round, on account of the form of the action, when he is entitled to recover in any other form, unless supporting the action in its present form would tend to confound all forms of action, which experience convinces us, would produce great confusion and injustice.

I will not say, that a parol insurance may not be valid ; but it is certainly worthy of remark, that there is no instance that I ever heard or read of, where such insurance has been made. Were it sanctioned, it would from the nature of the transaction, be productive of much more uncertainty and inconveniency, of fraud and perjury, than parol sales of land. Parol sales of land are rendered invalid by positive law ; parol insurances are not ; and by the general principles of contract, I cannot say, that such a contract may not be valid ; but to be so, I conceive that it ought to be proved clearly and beyond a doubt ; the full extent and limits of it ought to be ascertained by unexceptionable evidence ; a doubt in these particulars ought to be fatal to an action on it.

Could this action be supported without the evidence of James Yard ? If it could not, that evidence cannot support it ; because every contract must be either valid or void at the time of making it. It cannot become the one or the other by any subsequent contingency ; there ought to be mutual remedies on it subsisting at the time of making, or is it null and void. It is not sufficient, that a remedy may arise on an uncertain event. If the plaintiffs here had a remedy, exclusive of the testimony of Yard, why was his testimony introduced ?

His evidence is not reconcileable with that of Wildes. He certainly betrays a great want of memory in particulars, important to satisfy the mind ; his evidence seems not very consistent with the nature of the transaction, it was produced to establish.

The memorandum is not certain. It ought to have been as certain as the policy itself ; or at least, as certain as the memorandum delivered to underwriters in such cases. It is not stated, whether there was to be any warranty ; consequently, the extent of that warranty is unknown. Into what confusion would this uncertainty have led, had the vessel been lost ?

Favorable cases make bad precedents. If this verdict be established on the good character of Mr. Yard, similar verdicts will be established on characters not so unexceptionable.

Upon the whole, after the short consideration which the various business in the court has enabled me to devote to this case, I am much afraid, that should we sanction this verdict and principle,

“ 'Twill be recorded for a precedent;
And many an evil by the same example
Will rush into the state.”—

I am of opinion, that the case requires deliberate reconsideration; but as the rest of the court are of a different opinion, the motion for a new trial is denied and judgment for the plaintiffs.

MARCH TERM 1808.

SUPREME COURT AT PHILADELPHIA.

FOR THE EASTERN DISTRICT.

CORAM—TILGHMAN CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

DAVID KNOX and WILLIAM DEAS *against* PETER SUMMERS.

The creditor of one partner is entitled to levy on the joint stock, but subject to the joint debts of the partnership.

Where goods levied have not been removed by the sheriff the creditor loses his lien, if suffering them to remain in the possession of the debtor, has given him a false credit.

CASE stated for the opinion of the court.

A *fieri facias* issued in this action, returnable to September term 1805, which on the 10th June 1805, was levied on personal property, as per inventory. The debt was 430l., with interest from 28th January 1805. The amount of the plaintiff's debt has been paid into court, by the assignees of Stacey Horner and Peter Summers, subject to the opinion of the court, whether on the following statement of facts, the plaintiffs by virtue of their execution, or the said assignees by virtue of their assignment and a subsequent execution, are entitled to the money thus paid.

It is agreed, that at the time the above execution issued, and when it was levied, the said Horner and Summers were partners in trade; that the judgment was obtained, and the execution issued for the separate debt of Summers, but was levied on the joint effects of Horner and Summers, to the amount in value at least of \$5000. as per inventory; that no person was left in custody of the goods, nor any further

proceedings had on the execution until the 31st July following ; during which interval the said Horner and Summers continued to transact business on an extensive scale, by buying and selling as wholesale and retail grocers, and contracted debts to several of the creditors, for whose benefit the assignment hereafter mentioned was made, to the amount of \$4000 at least, for goods purchased and delivered after the plaintiff's execution was levied.

It is further agreed, that on the 25th July aforesaid the partnership of Horner and Summers was dissolved by consent, and the goods, wares, and merchandizes of the late firm, were transferred and delivered into the possession of the said Summers, who in consideration thereof confessed a judgment to his partner Horner, who on the same day issued execution thereon for the sum of \$9611, and 98 cents, declaring the same to be for the benefit of Horner's and Summer's creditors, to whom the judgment and execution were afterwards assigned; that this execution was delivered to the sheriff the day it issued, and that on the 30th of the same month, Summers made an assignment to Edward Thompson of all his effects, described as follows; all the goods, wares, merchandizes and groceries to me belonging, and which are placed, contained, or lodged in any of the ships, stores, rooms, houses, or warehouses, now or lately occupied by me, or in any ship, store, room, house, or warehouse whatever, situate," &c.; that on the same day, possession was delivered, and on the day following, the execution at the suit of Horner, was duly levied on the effects assigned, and possession thereof taken by the sheriff, who afterwards took, from under the hand and seal of the said Edward Thompson, an agreement in writing to deliver up the said goods, or to pay the debt, interest and costs due on the execution of Horner against Summers; that the said Edward Thompson on the 1st August following re-assigned and transferred unto William Warner, Samuel Hazlehurst, and Chandler Price, in trust for the general benefit of all the creditors of Horner and Summers last aforesaid mentioned, which were immediately delivered by the said assignees on their agreement to pay the amount of the plaintiff's execution into court, to be appropriated as the court shall direct.

The case was submitted to the decision of the court, by the counsel, without argument.

Per cur. The assignees of Horner and Summers are entitled to the money on two grounds.

1st. The separate creditor is entitled to no more than the interest of Summers, subject to an account between him and the partnership, and of course to the joint debts. 4 Ves. jr. 397, in exchequer.

2d. Leaving the goods levied on in the possession of the debtor, has here given him and his partner a false credit ; and has thereby injured strangers, which has never been permitted in any of the cases we have determined.

Certiorari to the Quarter Sessions of the peace of Lancaster county, concerning a road beginning at May Town and leading from thence to or near JOHN HALDIMAN'S Mill in Donegal township.

Confirmation of a road reversed, because the reviewers had not actually reviewed the road ; and because one of the petitioners for the road, had been appointed a reviewer.

It appeared by the record returned, that at February sessions 1804, the road had been applied for by petition, and viewers appointed ; at May sessions following the viewers reported that the road was necessary for public use ; at August sessions following, a review was prayed for, upon which Samuel Evans was appointed one of the reviewers, which said Samuel had with six others signed the original petition for the road ; and a return having been made at November sessions following, concurring with the former return, the same was confirmed as a public road.

It also appeared by two affidavits, that there had been no actual review of the road.

Mr. Hopkins submitted the case without argument to the court, Messrs. Smith and Montgomery of counsel in support of the road, not being present.

The court reversed the proceedings below, as well because there really had been no review, as that one of the petitioners for the road had been appointed a reviewer. It is inconsistent with the first principles of justice, that the same person should be both judge and party.

PAUL HENRY MALLET PREVOST, plaintiff in error *against* FRANCIS NICHOLLS.

Where the substantial merits of a case have been tried on a feigned issue, court will amend a clerical error, though after error brought.

It cannot be assigned for error, that the adverse party has renounced a matter agreed on for his own benefit.

Executors or administrators cannot vary the rights of creditors as to their shares of the assets. Liens on the estates of descendents, attach from their death.

WRIT of error to the Common Pleas of Berks county.

It appeared by the record returned, that a suit had been brought by

James Wilson, esq. against John Lewis Bard, in the same court ; and that on the 18th May 1798, by consent, all matters in variance between the parties were referred to Valentine Eckert, Jacob Bower, Rees Moore, Daniel Buckley and Samuel Morris, or any three of them ; and it was agreed, that the names of Ann Barb and Robert A. Farmer, administrators of J. L. Bard, deceased, should be inserted as defendats.

On the 9th August 1798, the referees reported the sum of 12459l. 10s. 9d. due to the said James Wilson, from the estate of the said J. L. Bard, deceased, 5380l. whereof, (being the consideration money for the lands purchased by the said J. L. Bard, of the said J. Wilson,) they awarded to be paid agreeably to the terms of sale, and the remainder to be paid in specie. And they further awarded, that on payment of the said sum of 12459l. 10s. 9d. by the said defendants, the said J. Wilson, his heirs, executors or assigns should convey the premises so purchased, to the heirs of the said J. L. Bard, in fee, or otherwise complete the same. The said report was read in court, and confirmed *nisi* ; but afterwards on motion and exceptions filed, *curia advisare vult*.

On the 17th December 1798, the report was confirmed absolutely, and judgment *nunc pro tunc*, [Mr. Wilson having died on the 21st August 1798,] with stay of execution, till a deed be produced and filed in the Court of Common Pleas agreeably to the report ; and till the court shall adjudge that it conveys a fee simple in the premises to the heirs of the said J. L. Bard, according to law.

Whereupon the administrators of Bard brought a writ of error, returnable December term 1799, in the Supreme Court ; and on the 28th March 1801, after argument, the judgment of the court below was affirmed in this court.

John Rainey Bard, and the aforesaid P. H. M. Prevost, also obtained judgment in the said court of Common Pleas on the 8th August 1798, upon the report of referees against the administrators aforesaid, of the said J. L. Bard ; and the aforesaid Francis Nicholls, the defendant in error, became a purchaser under the sheriff's sale of the Birdsborough estate for 7020l., (which had formerly been contracted for by the said J. L. Bard, with the said J. Wilson,) founded upon that judgment, he having previously bought in the judgment obtained by Wilson. Nicholls hereupon moved the Court of Common Pleas, for a rule directing the sheriff to execute a deed to him for the Birdsborough estate, upon his entering satisfaction for 7020l. the amount of the purchase money, deducting the costs due to the sheriff, and he the said Nicholls, paying the same. Upon which an agreement took place, that an amicable action on the case should be

entered by the said Francis Nicholls, against the said P. H. M. Provost, as of April term 1801, in the said Court of Common Pleas ; that the plaintiff should declare against the defendant upon a wager between the parties, respecting the right to receive the monies arising from the sale of the said estate, the plaintiff alleging that the same should be paid to the proprietor of the judgment of Wilson, against the administrators of J. L. Bard, (which proprietor it was admitted was the said plaintiff,) until the amount of that judgment was satisfied, the defendant denying the right of the said proprietor to receive such money ; that an issue should be thereupon joined, so as to obtain a decision of the question whether the said proprietor is so entitled or not ; and that it should be tried by a special jury.

The plaintiff declared on a wager of 200 dollars respecting a judgment entered by the administrators of J. Wilson, against the administrators of J. L. Bard, whether the proprietor thereof was entitled, &c.

The cause came on to trial at Reading, on the 5th August 1803, when the counsel for the plaintiff produced in evidence a report of referees in an action in the aforesaid Court of Common Pleas of Berks county, in which J. Wilson, esq., was plaintiff, and the administrators of J. L. Bard, were defendants, in the words following, (*prout* report,) on which said report the judgment of the said court was entered in the words following, (*prout* indorsement on the report,) and also gave in evidence the record of the removal of the said suit by writ of error into the Supreme Court, (*prout* record annexed,) and that the sales of the Birdsborough estate amounted to 7020l., and rested there. Whereupon the counsel of the defendant offered evidence to prove the terms of the sale of the land mentioned in the said report, as having been purchased, of J. Wilson by the said J. L. Bard, and also to prove the quantity of land so purchased, and the sum to be given therefore. And the said defendant by his said counsel, offered evidence to prove, that the said J. L. Bard, was in possession of the said tract of land under the said agreement of sale, made valuable improvements on the same, and continued in the uninterrupted enjoyment and possession of the same till his death. And the said defendant by his counsel aforesaid, offered evidence to prove, that the purchase money due for the said land, was tendered agreeably to the terms of sale, and has since been paid into the said court. But to this the counsel for the said plaintiff objected, that it was not competent for the defendant to give such evidence in the said issue, as tending to draw into question and controversy the said award and judgment so offered in evidence by the plaintiff ; of which opinion was the court, and overruled the said

evidence. Whereupon the bill of exceptions was tendered, sealed and signed by the justices.

General errors being assigned, and in *nullo est, erratum* pleaded thereto, the same were fully argued by Messrs. Ingersoll and Lewis for the plaintiff in error, and by Messrs. E. Tilghman and Hopkins for the defendant.

Three points were made by the plaintiff's counsel.

1. The judgment was obtained by Mr. Wilson himself on the report; but the declaration is framed on a wager, whether the proprietor of the judgment entered by the administrators of J. Wilson was entitled to the money on the sales. This does not correspond with the agreement to enter the amicable action. Evidence improperly received or rejected, is error, Runn. 376, 378. And all errors apparent on the record may be taken advantage of, though not contained in the bill of exceptions. 5 Co. 37, b. Bac. Abr. Error K. Mall. Mod. Ent. 228, 276.

2. Though the plaintiff below obtained a verdict and judgment thereon, he was not entitled to recover. There was a *cesset executio* on the final judgment of J. Wilson, until a deed should be produced and filed in court, and approved of by the justices thereof. No evidence of this kind was offered on the trial.

3. The evidence offered by the defendant below, which was overruled, did not tend to draw in question the former award and judgment but was not in strict conformity thereto. The report mentions the terms of sale, but is silent as to what they were: but it is expressed, that the 5380l. should be paid according to the original contract, and the residue of the sum found due in specie. This clearly shows that according to the first agreement, the former sum might be paid in something distinct from specie, in the bonds or notes of Mr. Wilson, which were at the time in a state of depreciation. What rational ground could be assumed, to induce the court to overrule evidence adduced to show that the administrators of J. L. Bard had complied with his contract, and had actually lodged the whole purchase money in court? The improvements made by Bard in his life-time, might also form a material consideration, when the price of the lands was much increased thereby.

Mr. Wilson can have no lien beyond his purchase money; if that has been paid, or tendered, and lodged in court, according to the terms of sale the assignee of his administrators can only come in for the remaining 7079l 10s. 9d., as other creditors by simple contract. On the death of J. L. Bard, the liens of his creditors attached, according to their dignity. Here there is a deficiency of assets and the question is, whether the proprietor of Wilson's judgment shall sweep away the

whole of the money arising on the sale of lands? That judgment confers no lien: it may be conclusive between the parties, but not as to third persons who are interested. Nor can the administrators of Bard, by any agreement whatever, determine the priority of any particular claimant, in derogation of the rights of the general creditors. A judgment may be avoided without a writ of error, by a plea, where the party is a stranger to it. 2 Mod. 308. Cro. El. 199. 11 Co. 42, a. 44. b. Godb. 377.

The counsel for the defendant in error answered—

1. There is no substantial variance between the declaration and the agreement, on which it was founded. J. Wilson died between the first and second judgments, and therefore the final judgment may fairly be said to have been entered by his administrators. The object of the parties was to try the claim of Nicholls under the judgment which he had purchased, and every thing formal, which would contravene that object, must be discarded. But if it was really an error it is not incurable. Here is something to amend by, and the declaration may at this moment be amended. Amendment may be, even after error brought. 4 Dall. 268. 1 Wils. 303. 1 T. R. 782. 3 T. R. 369. 5 Burr. 2730. No exception was taken to want of form at the trial, but the same was conducted on its merits. If it was then supposed, that the judgment offered in evidence was irrelevant to the issue, the objection should have then been made.

2. It does not lie in the mouths of creditors to object, that the defendant in error has not got a good title. If he is contented with having the equitable interest of J. L. Bard vested in him under the sheriff's sale, and has succeeded to the rights of J. Wilson by buying in the judgment, he takes the lands at his own risk. But as well might it have been urged, that if Mr. Wilson had been in full life, and had purchased at the sale, that it would have been indispensably necessary in the first instance to have filed his deed. His administrators have not taken out execution, but the sheriff has proceeded on the process issued by J. R. Bard and the plaintiff in error to the sheriff.

3. Why was the parol evidence of Prevost offered on the trial, unless to set afloat what had been solemnly settled by the award and judgment? Of what avail was it, on the issue joined in the court below, that J. L. Bard had made valuable improvements on the land? It is clearly settled, that the merits of a judgment cannot be canvassed in another action. 7 T. R. 455. Nay, so far has the policy of the law carried this doctrine, that money passed under compulsory process, though unjustly received, cannot be recovered back in another suit. Ib. 269.

It has been said, that the 5380l. has been tendered and lodged in court. Admit it, for argument's sake. There is still 7079l. 10s. 9d. remaining of the sum awarded, which, exclusive of interest and cost, payable to the sheriff, would be more than sufficient to discharge the sum for which the lands were struck off. So that it is perfectly immaterial whether the 5380l. was paid or not.

But it is urged, that Wilson's judgment created no lien, and that the rights of other creditors are violated by the verdict. The court are confined to the record, and can take notice only of the parties to the writ of error, who are the only creditors that we know of. No deficiency of assets is stated, nor will it be presumed. Every thing shall be intended in favor of a verdict. 1 Wils. 2.

The question of lien necessarily came before the jury, when they determine the point, that the proprietor of Wilson's judgment was entitled to the money on the sales. It was in fact submitted to them by joint consent; and it was competent to the administrators of J. L. Bard to conclude the other creditors, by their agreement made *bona fide*, to ascertain the claim under Wilson's judgment. It is admitted, that fraud would form an exception, but that it is not insinuated here. Creditors cannot interfere with the duties of executors or administrators. 2 Equ. Ab. 253, pl. 10. Endless confusion and litigation would ensue from such usurpations of creditors. Suppose a mortgage not recorded, and a recovery had against the administrators, could other creditors review the correctness of that recovery in a suit against them?

In this instance, the legal estate in the lands sold by contract to J. L. Bard, subsisted in Mr. Wilson at the time of his death, and after his death became vested in his heirs. The plaintiff in error now represents the heirs of J. L. Bard, who were divested of their equitable interest in the Birdsborough land; and it would seem that the principle adopted by the court in the case of Mr. Hallowell, who was the trustee of Thomas Greaves, would apply to the defendant in error, and give him a preference of payment in the sum awarded.

Tilghman, C. J. took no part in the decision, having formerly been of counsel in the cause.

Yeates, J. delivered the opinion of the court.

It has been assigned for error in this case, that the issue joined between the parties did not correspond with the agreement upon which it was bottomed. The agreement was, that Nicholls, who had become the purchaser of the Birdsborough estate under the sheriff's sale, and who was also the proprietor of the judgment of Wilson against the

administrators of J. L. Bard, should declare upon a wager against Prevost, respecting his right to receive the monies arising upon the sale of the said estate, Nicholls alleging, and Prevost denying such right. The declaration founded thereon, laid the wager as respecting a judgment entered in the Court of Common Pleas of Berks county, by the administrators of J. Wilson, against the administrators of J. L. Bard, whether the proprietor thereof was entitled to receive the money arising from the sales of the estate of Birdsborough.

This objection goes to the mere form of the feigned issue ; and in such a case, the court would be very liberal as to granting amendments where the real merits of the controversy have been fairly tried. The report of the referees was filed in the Common Pleas on the 9th August 1798, and confirmed *nisi* in the life-time of Mr. Wilson ; but upon exceptions being filed, the court continued it under advisement. On the 17th December following, the report was confirmed absolutely after the death of Mr. Wilson, and judgment entered *nunc pro tunc*. Correctly speaking, the judgment was entered in his name ; but in truth it was finally obtained by his administrators. The substantial issue was thoroughly understood by the parties and their counsel on the trial ; no objection was made to the judgment being received in evidence, on account of the variance ; nor was any motion for a new trial made on this ground. Under these circumstances, we do not apprehend that this clerical oversight would warrant us in pronouncing it to be an incurable error.

It has also been contended, that it appears on the face of the record that the proprietor of the judgment was not entitled to the amount of sales, inasmuch as it was part of the judgment of the Court of Common Pleas founded on the award of the referees, that there should be a stay of execution till a deed should be produced and filed in that court agreeably to the report, which should be adjudged to convey a fee simple in the premises to the heirs of the said J. L. Bard, according to law ; and that it does not appear that such deed has been produced or filed.

The answer given by the counsel of the defendant in error appears satisfactory to us. The lands, and all the interest of J. L. Bard therein, became vested in Nicholls by due process and operation of law. He became thereby the *hæres factus*, and it was competent to him alone to demand of the legal representatives of Mr. Wilson the fulfilment of the condition imposed on them. *Volenti non fit injuria*. He might dispense with this act on their part ; and might well conceive, that by uniting his interest under the sheriff's sale, with his proprietaryship of the judgment, he combined the equitable title of

Bard with the strictly legal title of Wilson. But it never can be assigned for error against one of the litigant parties, that he has thought proper to renounce a right introduced for his own benefit.

A more formidable objection arises on the bill of exceptions, which is not worded with great accuracy or precision. But we are confined to the facts therein set out, and are not allowed to travel out of it. "The defendant below offered evidence, to prove that the purchase money due for the said land, was tendered agreeably to the terms of sale, and had since been paid into the Court of Common Pleas," which was overruled, as tending to draw into question and controversy the award and judgment before shown in evidence.

The referees reported the sum of 12,459*l.* 10*s.* 9*d.* due to J. Wilson from the estate of J. L. Bard, deceased, 5380*l.* whereof (being the consideration money for the lands purchased by the said J. L. Bard of the said J. Wilson) they awarded to be paid agreeably to the terms of sale, and the remainder to be paid in specie. The report is silent as to the terms of sale. We know not whether the 5380*l.* was stipulated to be paid in the notes of Mr. Wilson, or in paper of another description; but whatever it was, it is contradistinguished from specie in the award. It is fully established, that the merits of a judgment cannot be overhauled or canvassed in another suit; and that a different doctrine would render the administration of the law a circle without end. At the same time, it is clear that the production of testimony, evincing that the whole or part of a judgment has been satisfied, does not derogate therefrom, or draw in question its propriety. If the plaintiff in error was desirous of showing, that the administrators of J. L. Bard had satisfied part of the judgment, it became indispensably necessary that he should prove the terms of sale *aliunde*, the report not specifying them. It follows of course, that if the non-payment of the 5380*l.* was made a ground of recovery by the plaintiff below on the feigned issue, the testimony offered by the defendant below should have been received upon every principle of distributive justice.

The counsel of the defendant in error admit the force of this reasoning; but contend that they were entitled to recover on the feigned issue indepently of this 5380*l.*, which being deducted from the sum awarded of 12,459*l.*, 10*s.*, 9*d.*, would leave a balance for 7079*l.*, 10*s.*, 9*d.*, still due to him, as the owner of Mr. Wilson's judgment. This sum, with the arrears of interest due thereon since December 1798, when the report was confirmed, and the sheriff's fees added, which Nicholls offered to pay, would greatly surmount the 7020*l.*, which he bid for the premises, and consequently there would be a fund over which he had a control, more than sufficient to pay the purchase money,

agreeably to his motion in the Court of Common Pleas, even dropping the 5880l.

These observations have great weight, provided a previous point is established, that the judgment of Wilson gives a priority of payment as to this 7079l. 10s. 9d., and the accruing interest out of the assets of J. L. Bard, deceased. There can be no doubt of the pre-existing lien of Mr. Wilson as to 5880l., the purchase money of the Birdsborough estate. The legal estate remained in him, and he was not bound to convey the same under the articles, until the stipulated consideration was fully paid and satisfied. But under our present view of the question, this sum cannot form any part of our consideration.

The defendant's counsel insist, that the 7079l. 10s. 9d. became entitled to a preference of payment, by the act of the administrators of Bard, and the report and consequent judgment thereupon; and that the question of lien was expressly submitted to the jury on the trial of the feigned issue, who have found in its favor. They assert that it was competent to the administrators to conclude other creditors (though it is said the record affords no evidence of there being such creditors) as to the extent of the lien under Wilson's judgment; and unless this can legally be done, endless confusion must ensue. It is further alleged, that nothing is stated on the record from which can be collected a deficiency of assets.

The 14th section of the act of 19th April 1794, 3 Dall. St. Laws 527, prescribes the mode in which the debts of decedents shall be paid. After enumerating those debt which are intitled to a priority, it directs an average of the remaining assets amongst the other creditors *pro rata*. And in the case of Philip Wootering against the executors of Gen. Walter Stewart in December term 1799, it was determined by this court on full argument, that a judgment obtained against the executors or administrators of a deceased person gained no priority as to payment; and that the dignity of the debt when the party died, formed the sole characteristic feature of distinction. This appeared to accord with the policy of the government from the earliest times; and it made no difference as to creditors, whose liens attached only on the death of the testator or intestate, whether the assets arose from the sale of real or personal estate. Though the personal representatives of a deceased person might by their *bona fide* acts, conclusively define the extent of claim of the different creditors, they could not vary the vested interests of the different creditors, nor change the order of payment; for this would militate against the express provisions of the law. Neither did the report of the referees, nor the judgment of the court go further, than to ascertain the amount of Mr. Wilson's demand;

they left the order of payment to be fixed by law, according to the nature of the debt. Nor could the jury by their verdict violate the provisions introduced for the benefit of the general creditors. It is perfectly clear, that there are at least two adverse creditors to the defendant in error, and that there is a deficiency of assets ; because the record states the sheriff's sale of the Birdsborough estate to have been founded on the judgment of Prevost and others against the administrator of J. L. Bard ; and the present controversy is, who is legally entitled to the money produced by the sales. In determining this question, it can be of no moment which of the judgments is first in point of time against the administrators. Priority of payment as I have already mentioned, must depend on the nature of the demand, as it existed at the time of the death of Bard.

But the counsel of the defendant in error have assimilated the present case to that of *Frazier's et al. lessee v. Hallowell*, upon which this court expressed their opinions in September term 1805 ; and have contended, that Mr. Wilson not having parted with the legal estate in the lands, remained the trustee of Bard, which drew after it a lien on the whole sum due to him. The majority of the judges who decided for the defendant, went on the ground, that from the circumstances of the case, it was fairly to be presumed, that Mr. Hallowell, lent the notes to Greeves on the security of the mortgage taken in his own name ; and especially as no consideration was stated or contended for, which might have induced Mr. Hallowell to give his notes. But in the present instance, it is admitted, that the balance of 7079l. 10s. 9d. arose from a course of mutual dealings between Wilson and Bard ; which therefore excludes the presumption of the former regarding the strictly legal title in himself as a plank of indemnity. Thus materially distinguished, we think the decision in the former action cannot influence the question before the court.

It appears that if the defendant in error relied on the 5380l. as a ground of recovery, the court below should have received the testimony offered of the terms of sale, and the tender made pursuant thereto. And if this ground was relinquished, and recurrence had to the 7079l. 10s. 9d. he had no superior lien as to this last sum on the assets of J. L. Bard deceased, to other creditors, whose demands were of equal dignity with his own at the time of Bard's death, which would have warranted a recovery on legal principles.

The judgment of the Court of Common Pleas is therefore reversed.

DAVID MOFFAT administrator of ROBERT MOFFAT *against* ISRAEL
ISRAEL.

Action for money had and received, will not lie against a sheriff for improperly paying over money, while his vendee who would rescind the contract holds the title of the lands.

MOTION to take off nonsuit, had before Mr. Justice Brackenridge at Nisi Prius on 23d November last.

He now reported the evidence given in the cause.

The suit was *indebitatus assumpsit* for money had and received by the defendant, to the use of the intestate, under the following facts: On the 25th November 1801, Robert Moffat purchased a lot of ground in Southwark, which was, sold by the defendant as sheriff of Philadelphia county, for \$130. The sale was held under executions issued at the suit of Peregrine H. Wharton against the administrators of John Bailey. The purchaser paid the money on the day of sale, obtained the sheriff's deed and took possession of the lot. After the sale and before the money was paid over by the sheriff, he was informed that this lot, with three other lots, had been mortgaged by Bailey and his wife to Malcolm M'Nair on the 13th June 1796, to secure the payment of 112l. and interest, and that the same was prior to Wharton's judgment; but it did not appear, that at the time of the sale, the defendant knew of this mortgage, or gave any notice of it when he made the sale under the execution. Some short time after, the defendant paid over the money to the attorney of Wharton. A *scire facias* was afterwards sued out upon the mortgage against the tenants to September term 1804, and the present suit was brought against the sheriff to September term 1805, to recover back the money paid him.

Mr. S. Levy for the plaintiff, insisted, that the sheriff was bound by the duty of his office, to examine the public offices, in order to ascertain the incumbrances on the real estates he was about to sell, and to advertise accordingly.

The purchaser is not bound to search the records: the sheriff at his risk must apply the money arising from the sales to those incumbrances, which were prior in time. If the property of goods which he has levied on be disputed, he may move that the proceedings against him may be stayed, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity: Tidd 398 (741.)

A sheriff having two executions in his hands, levies and sells under the second execution, he is liable to both parties. 1 T. R. 729, 732. A suit would well lie against the defendant, before any recovery had on the mortgage. He was guilty of deceit in paying over the money

wrongfully, after he had received notice of the mortgage ; but it is competent to the injured party to waive the tort, and bring an action for money had and received. Cowp. 419.

Messrs. T. Ross and Condry, for the defendant, denied that the sheriff was more bound to look into the incumbrances of lands under execution than purchasers. Every man buys lands at a sheriff's sale at his own risk. The sheriff is not bound to warrant the title he is selling ; nor has he it in his power to exempt the lands from mortgages prior to the judgment, under which he is selling. Suppose a mortgage fraudulently given, to save the land from creditors, it will not be expected, that the sheriff is to decide on that question. But would a suit for money had and received, lie against the sheriff under the circumstances of this case ? If it lies at all, it should have been brought against the plaintiff in the execution, who has received the money, as it is said, under an indemnification. Here has been no evidence of a recovery of the mortgage money. It may be, that the same is fully satisfied, and the purchaser may have it in his power to show it by full proof. If any suit would lie against the defendant it must be for misfeasance in his office. Besides, the intestate brought but one lot of the four lots mortgaged, and the other lots are liable to contribution, supposing the mortgage to be really due. At all events, a purchaser, while he holds the title of the lands sold in his own hands, cannot bring a suit to recover back the money he has paid, without in the first instance tendering a re-conveyance to the vendor.

The chief justice, after stating the case, delivered the opinion of the court.

A good deal has been said during the argument, concerning the duty of a sheriff to give notice of incumbrances, and to apply the proceeds of the sale to the payment of the liens on the land, whether by judgment or mortgage according to their respective priorities. The court deem it unnecessary to give any opinion on these points : because independent of any thing of that kind, there was sufficient cause for nonsuiting the plaintiff.

If the plaintiff can recover in this action, it must be, because equity demands, that the defendant should refund the money which he paid to Peregrine H. Wharton, instead of applying it as he ought to have done, to the discharge of the mortgage. But a decisive objection to the plaintiff's claim, is, that it would be against all equity, that he should get back his money, and at the same time keep the land. He ought to have tendered to the defendant, a re-conveyance, to be delivered on

payment of the money. He cannot be allowed to affirm and avoid the contract at the same time. The court are therefore of opinion, that the motion to take off the non-suit, be rejected.

AT A CIRCUIT COURT HELD AT BETHANEY, JUNE 1808.

CORMAN—YEATES, JUSTICE.

JONATHAN BRINK *against* JAMES BELL.

The report of referees, that the parties had dispensed with their being sworn, is *prima facie* evidence of its contents.

THIS suit was for work done, and originated before Moses Killem, esq. a justice of the peace, for Wayne county. On the 16th May 1805 the justice after a hearing, gave judgment for the plaintiff for 76 dollars and costs ; from which the defendant appealed, and gave the security prescribed by the act of 28th March 1804. (6 St. Laws 386.) The defendant afterwards removed the cause into the Circuit Court by *habeas corpus* ; and the action being referred the referees reported 60 dollars to be due to the plaintiff, and certified that the parties had dispensed with their being sworn or affirmed.

Exception was now taken to the report by Mr. J. Ross, for the defendant ; that this dispensation ought to appear to have been agreed upon, by the rule of court ; and that the court could not take the fact from the certificate of the referees.

Sed non al locatur. The words of the arbitration act of the 21st March 1806, § 3, (7 St. Laws 559,) are that the referees chosen, shall be sworn or affirmed, “ unless the same shall be dispensed with by the consent of the parties.” Here the judges of the parties own choosing, have certified the fact, which is *prima facie* evidence of its truth, and is even uncontradicted by the defendant’s assertion. Lay any reasonable grounds to create a suspicion of its truth, and the matter will be required into. At present, it is a mere question of evidence.

It was then insisted, that the defendant should be allowed 50 cents per day for every day he had attended on the appeal ; and this was within the spirit of the 4th section of the act of 28th March 1804. This court will not discourage appeals, from the partial decisions of jus-

tices of peace. The defendant was injured thereby in the present instance, to the amount of \$16; and he had no other mode of redress but by an appeal. Ought he in such a case to pay cost upon any principal of equity?

Mr. Sitgreaves for the plaintiff. The present motion is grounded neither on the spirit or words of the law. The object of the legislature was to guard against frivolous appeals; and by the words the defendant is only intitled to his 50 cents per day, in the case of an appeal by the plaintiff. If the plaintiff here had obtained an affirmance of the justice's judgment, or had recovered more than such judgment amounted to, he would, under the clear expressions of the act, have been intitled to his 50 cents per day.

Antecedent to the provisions of this act of experiment, a less sum recovered on an appeal by a plaintiff, than a justice had rendered his judgment for, would be no bar to the recovery of his legal costs; and the act creates none where the defendant has appealed. Here the plaintiff could have been without remedy, if he had not sued before the justice. There is nothing scarcely about which there is so great difference of opinion as the value of work done; it differs in different places in the same county, and the referees might have disagreed from the justice, without any imputation on his decision. If the quantum of the sum demanded had been the ground of dispute, the defendant should have tendered what he thought due, and then the question would have come on fairly to trial.

The litigious spirit of the defendant has led him to pursue a losing game; he deserves to be punished still further. The Circuit Courts in the different counties are different branches of the Supreme Court, and come instead of the courts of *Nisi Prius*, except as to Philadelphia county by the act of 20th March 1799. 4 Dall. St. Laws 362. Inasmuch therefore, as a sum not amounting to 50l. had been found due by the report of referees, and the defendant has removed the cause, he is liable to pay double costs under sect. 3 of the act of 20th May 1767. The plaintiff moves, that the judgment be so entered. 1 St. Laws 479.

The court fully adopted the system of reasoning of the plaintiff's counsel; and further added, that the defendant might have suffered judgment to go against him by default, without offering any testimony of payments, set-offs, &c. before the justice, could he by the production of his evidence before a jury or referees, reduce the sum found due by the justice, and mulct his adversary in costs? Yet such would be the consequence of the doctrine contended for!

Judgment for the plaintiff, with double costs.

AT A CIRCUIT COURT, HELD AT WILKESBARRE, JUNE 1808.

CORAM—YEATES, JUSTICE.

JOHN COOLBAUGH and HENRY SHOEMAKER, administrators *de bonis non cum testamento annexo* of JOHN VAN CAMPEN, deceased, *against* the Commonwealth.

A Pennsylvania claimant cannot maintain a suit against the commonwealth for compensation for lands, until the commissioners have signed a certificate to the Connecticut claimant.

THIS was an amicable action entered in the Supreme Court September term, 1803, to recover compensation for certain lands in Luzerne county, under the 9th section of the act of 6th April 1802. 5 St. Laws 205.

The plaintiffs showed in evidence a fair exclusive regular title, vested in their testator, to 591 acres, in Abraham's Plains, now in Kingston and Exeter townships, founded on two patents issued to Colonel Turbutt Francis, dated respectively on the 24th February 1774, and 14th June, 1774 ; that the same lie within the seventeen townships in the county of Luzerne, and are occupied by Connecticut claimants, to whom certificates have been granted by the commissioners, except as to a very small part which remains in dispute between two of the settlers. These certificates were dated on the 16th and 21st January 1804. The estimated value of the different lots or parcels of the land in its natural state, independent of improvements, was also shown by several witnesses.

A motion was hereupon made by Mr. J. Ross for the commonwealth, that the plaintiffs should be nonsuit, having no right of action against the state, until the certificates were given by the commissioners.

After argument, Yeates, J. declared his opinion, that it appeared to him the suit had been brought prematurely. The claims of the Connecticut settlers were to be established by the express words of the law, before a right of action vested in a Pennsylvania claimant, neglecting or refusing to release, to institute a suit against the commonwealth, for a just compensation. No claim could be said to be established, until the certificate therefor was signed by the commissioners ; the title of the settler did not attach by any survey made. It was possible, that there might be lands within the seventeen townships, to which no good Connecticut claim could be shown ; and in such case the Pennsylvania claim-

ant was not barred from recovering the land, if he had not released to the state. But let the inconveniences be what they would, the court was bound by the plain words of the law, and it was a settled principle, that no sovereign power was amenable to answer suits either in its own courts, or those of a foreign country, unless by its own consent.

It was hereupon agreed by the counsel, that the jury should be discharged and application made to the attorney general to waive the legal point ; and in case of his refusal, the suit to be discontinued.

Mr. Sitgreaves, *pro quer.*

AT A CIRCUIT COURT, HELD AT SUNBURY, JUNE 1808.

CORAM—YEATES, JUSTICE.

Lessee of WILLIAM GRAY *against* SAMUEL MCCREARY.

When conflicting applications are in the hands of the surveyor, to be executed, he is restricted to their precise quantities ; and if he mistakes herein on the ground, he is bound to correct it before he returns the survey.

Adverse possession in case of boundaries, does not hold with the same force as in the case of possession of one entire tract of land.

EJECTMENT for lands, on the south side of Buffalo creek. There were about 30 acres in dispute, the controversy being confined to the division line between the two farms.

M'Creary was the tenant of Samuel Dale, whose death had been suggested. Both parties claimed under descriptive applications, entered in the secretary's office on 3d April 1769, the plaintiff under Thomas Foster, No. 675, the defendant under an earlier number, No. 206, in the name of James Fleming, each calling for 300 acres of land. Both applications were surveyed on the 12th August 1769, and it appeared from the field notes of William Maclay, who made the surveys, that 331 acres were surveyed under Fleming's application. The division line between the two tracts was called therein, S. 10° E. 384 perches, and was marked regularly on the ground. But Maclay finding upon calculation, that only 272 acres remained for Foster's application, returned a survey for him for 300 acres, 36 perches, calling the division line of the two tracts. S. 14½° E. as made on the 12th August 1769. On the 3d June 1776 a patent issued thereon to Thomas Rees, in whom

the right of Foster became vested by divers transfers ; and on the 24th October 1800, Rees and wife conveyed the premises to the lessor of the plaintiff, in consideration of 370l.

Maclay having made no return on Fleming's application, a survey was made thereon of 303 acres, by Joseph Wallis, on the 28th May 1785, calling the course S. 14½ E. between the two tracts, but the line was not marked ; and a patent according to the draft returned, issued to Fleming, on the 5th December 1785, who afterwards conveyed the same 303 acres to Samuel Dale, by courses and distances, on the 18th October 1786, in consideration of 600l. excluding the lands in question.

It appeared by parol evidence, that Fleming had first settled in 1773, on the disputed gore of land, had erected a small cabin there, in which he lived, and had cleared four or five acres, which he cultivated and held in his possession until he sold to Dale. He afterwards moved higher up the stream and built there. Dale in 1801, built a good square double log barn, on the disputed part, which cost him from 150l. to 200l. and a lane was occupied on each side by the different claimants. But at this time, Gray knew nothing of the lines of the tract he had bought the fall preceding.

The present ejectment was brought to January term 1804.

After the cause had been fully argued by Messrs. Duncan and D. Smith, for the plaintiff, and Messrs. C. Smith and Hall, for the defendant, Yeates, J. charged the jury in substance as follows :

To execute the equitable system of the lottery, on opening of the land office on the 8d April 1769, according to its true principles, it was indispensably necessary, that the deputy surveyors should exercise a reasonable discretion in making their different surveys ; it is evident that otherwise many persons would lose the lands they had applied for. They were instructed accordingly, that they should execute all warrants and orders of survey, according to the words thereof. Previous to the year 1767, large quantities of land were frequently surveyed, much more than the orders called for ; but by an order of the Board of Property of the 1st May 1767, the deputies were in future restricted to a surplus of 10 per cent. beyond the quantities contained in the warrant or application. But the rule always has been, that where there were conflicting rights in the hands of the deputy to be executed, to execute them according to their priority, but not to exceed the quantities called for, with the usual allow-

ance of six per cent. for roads and highways. This rule has been repeatedly declared, both at Nisi Prius and in the Circuit Courts ; and is so conformable to justice and reason as well as the spirit of the contracts between the lords of the soil and the individuals applying for lands, that it is to be wondered at, that any doubt could arise thereon.

It necessarily follows from hence, that if the deputy surveyor has committed an error in surveying a larger quantity of lands under an application, than he ought to have done, and is fully sensible thereof upon calculating what he has done in the field, he ought to rectify the error and make return of the true quantity of land to which the party is entitled. Having once returned the survey into the office of the surveyor general, his power is at an end, and he cannot subtract from or add to the survey, without fresh orders from his superiors. This is the daily practice, the legality of which has been often recognized in courts of justice.

Judging on these principles, there can be no doubt of the right of Maclay, to rectify the mistake which he made on the ground. It was his bounden duty to do so, as an honest officer. When Fleming and Foster applied each for 300 acres, it would be palpable injustice to admeasure 331 acres to the former, and 272 acres to the latter. It is true, that Maclay should have marked the new division line ; but this does not invalidate his return.

Fleming confirms this act of the surveyor by excepting the return of Wallis for 303 acres, and taking out his patent. It is a general principle, that a man shall be bound by the lines of his patent. It is a disclaimer of the lands beyond them, under the same title ; and this is strengthened if possible, by Dale's deed, excluding the lands in controversy.

The right of the thirty acres in dispute, is clearly in the plaintiff ; and the only doubt is, whether he is barred by the limitation act of 26th March 1785, (2 Dall. St. Laws 281,) from a recovery. The 3d section of that law, enabled persons then having right to lands, to commence their actions within fifteen years thereafter, and by another act of 12th March 1800, (4 Dall. St. Laws 595,) the time was extended to the 26th March 1803. The present ejectment was brought to January term 1804, after that time.

The limitation act is founded in sound policy, and conduces greatly to the peace of the country. But to make it applicable to any case, a clear adverse possession must be proved. It is evident, that in a question of boundaries, evidence of possession does not apply with the same degree of force, as where the whole of a tract of land is held ad-

versely against a claimant. And here it appears, that Gray at least did not know the true line of division.

But though Fleming accepted a return, and took out his patent in 1785, which would operate as a disclaimer of his title to the 30 acres, he did not in fact surrender up the possession of the land he had cleared, but he and Dale have held it ever since. If an adverse possession had been shown to this cleared land to the satisfaction of the jury, the limitation act may apply thereto, and save the barn erected by Dale in 1801, but not to the residue of the 30 acres.

The jury found a general verdict for the defendant.

A new trial was moved for, and the motion was afterwards argued. Yeates, J. said, he had no hesitation as to awarding the new trial, leaving the costs to abide the event of the suit. But the parties compromised on equitable terms and divided the costs of suit.

JULY TERM 1808.

IN THE SUPREME COURT AT SUNBURY.

FOR THE MIDDLE DISTRICT.

CORAM—TILGHMAN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE, JUSTICES.

GEORGE FREY, plaintiff in error *against* ROSEWELL WELLS, esq. and ELISHA HARVEY, ex'rs. of BENJAMIN HARVEY.

Record remitted to the Common Pleas, whereupon *nul tiel* record legal evidence has been overruled, on a writ of error.

WRIT of error to the Common Pleas of Luzerne county. The record appeared thus :

A summons issued in debt for 381l. 2s. 11d., returnable to November term 1797, which was returned served by the sheriff; whereupon Mr. D. Smith appeared for the defendants, prayedoyer of the writ, record, and special imparlance. A declaration was filed in debt, grounded on a judgment in Litchfield county, in the state of Connecticut, in March term 1775, "as by the records of the same court of Litchfield, and now here ready in this court to be shown, more fully is manifest and appears, which said judgment remains in full force and effect not satisfied or reversed, whereby action accrued,"

&c. In November term 1798, the defendants pleaded *nul tiel* record, with leave to alter, &c. In April term 1802, before Jacob Rush, esq. president, and his associates, the plaintiff produced in evidence in support of his declaration, a certain paper, purporting to be an exemplification of the record of the judgment obtained in the Court of Common pleas of Litchfield county, in the suit of George Frey against Benjamin Harvey, the testator, *prout patet* the exemplification of the record aforesaid, which paper was overruled by the court; whereupon judgment *quod non habetur tale recordum*.

The record was accompanied by the exemplification of the judgment of the Connecticut judgment, under the hand of Frederick Wolcott, clerk of the Court of Common Pleas of Litchfield county, and under the seal of the same court certified 2d February 1797, and was also certified by Joshua Porter, chief judge of the Common Pleas of Litchfield county aforesaid on the 15th November 1799; and further, that the copies were made out agreeably to the law and usage of the said state of Connecticut. But the said exemplification was not attached to the record, nor otherwise referred to therein, except as aforesaid.

The objection which prevailed in the Court of Common Pleas of Luzerne county was, that the exemplification was no legal evidence of the judgment, under the act of congress of 6th July 1797, not being stamped; and upon this decision the writ of error was brought. This court determined, upon full argument, that the certificate of the judge required no stamp, and that the exemplification shown was good and legal evidence of the judgment. During this argument, the counsel on both sides considered the exemplification accompanying the record, as the identical paper offered in evidence to the court below, and upon that ground this court decided.

In December term 1807, at Philadelphia, the counsel of the defendant in error objected, that no final judgment had been given in Luzerne county, whereon a writ of error would lie. The court there had determined, that the plaintiff had failed in showing his record declared upon; but had not rendered judgment for the defendants.

In debt on a bail bond, the defendant pleaded *comperuit addiem* and issue thereon: a day was appointed to bring in the record, but the defendant failed therein; whereupon judgment of failure of record and that the plaintiff recover. Lil. Ent. 498. A like entry in 10 Wentw. 456.*

But this objection was withdrawn, a final judgment having

* See 1 Crompt. 180, 185, 194. What shall be a failure of the record, see 21 Vin. Ab. 15. N. 17. pl. 8, 9, 10, 11—18. pl. 17.

been in fact given, though the prothonotary had omitted to enter the same.

The defendant's counsel then objected to this court's taking any notice of the paper alleged to be the exemplification of the Connecticut judgment, the same not being identified by a bill of exceptions, or any agreement of counsel.

The statute of Westm. 2. was made to remedy faulty decisions, *ore tenus*. 2 Inst. 426. A bill of exceptions lies on a challenge to a juror overruled. Dy. 231. T. Ray. 486. So if a man plead in any action and the justices will not allow thereof. F. N. B. 21, N. (50) It would seem therefore, that it would have been correct, to have taken a bill of exceptions to the overruling of the judgment in evidence, or to supply it by some agreement.

It may be urged, that oyer was prayed of the record; *non constat*, that it was granted. Nor were the defendants entitled thereto; the records of court being deposited in a certain place, and not removeable. If a bond is brought into court, oyer is grantable only the first term; for afterwards it is adjudged in the possession of the party: so of a recognizance, which is a pocket record. 3 Keb. 1 Ld. Ray. 84. Where a record is of the same court, it is proper to have oyer of it. 2 Ld. Ray. 1179. Where a record itself is shown to the court in pleading, the defendant cannot say *nul tiel* record for by the *proferi in curia* it appears to the court that there is such a record: as if letters patent are pleaded, the defendant may say *non concessit*, but not *nul tiel* record. Co. Lit. 260, a. Hard. 158. 1 Crompt. 190. 1 Sallon 382, 383.

The counsel for the plaintiff in error answered that the present objection was very singular in its nature, after the copy had been deemed and treated as the real paper shown to the court below.

For every error in point of law, some remedy is assigned. It has been adjudged by this court that a bill of exceptions will not lie to every opinion delivered by the Court of Common Pleas.

It ought to be on some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon fact not denied, in which either party is overruled by the court. Bull. 318, (310) Show. Parl. Co. 820. Here the existence of the judgment in Litchfield county was put in issue; and a copy is offered to prove it. The Common Pleas inspect it, and say it does not prove the fact for which it was introduced. The examination of the paper, precedes the courts' opinion, as to its effect. And under such circumstances,

no authority or precedent can be shown, that a bill of exceptions was ever taken. Besides the plaintiff in error could have no opportunity whatever of tendering his bill of exceptions; the final judgment for the defendant followed of course the decision of the failure of record; and it is settled, that the party excepting must tender his bill before judgment, 2 Inst. 427. 1 Bac. 226. (329 new ed.)

Moreover, here oyer was prayed, whereby the exemplification becomes a part of the record itself. 1 Dall. 461. Carth. 513. Crompt. 137. If there was any incorrectness in it, it was the defendants own fault; but he was intitled to oyer. Our practice is very loose, and chiefly consists of the declaration, and docket entries; it never appears by our dockets, whether the party praying oyer, has it, or not; but it is always presumed, in case he does not get it, when entitled thereto, he is not compellable to plead, reply, &c. as the case may be. Here the defendants have pleaded *nul tiel* record, and insisted on the want of a stamp as a bar.

The justice of the country can never depend on the agreement of one of the parties, to introduce a certain matter on the record. Such assent will always be refused, where it will be the interest of the party to withhold it.

It being considered that final judgment had passed in the court below for the defendant, it rests with this court to decide, whether it shall be affirmed, or reserved. They have no alternative. If it be affirmed, the plaintiff loses a just debt for no fault whatever of his own; but merely because the court below have committed, what must now be deemed an acknowledged error, in determining, that the certificate of the chief judge in the court of a sister state ought to have been stamped under the act of congress. If the judgment be reserved, palpable justice is done; and the rule in England is settled, that where the plaintiff below brings a writ of error, the superior court may not only reverse what is wrong, but give judgment for what is right; but where the defendant below brings error, B. R. only reverses such wrong part of the judgment as he complains of. 4 Burr. 2490, 2156. 2 Stra. 617. 1 Salk. 262.

Curia advisare vult.

And now, this term, the record having been removed into the middle district, in pursuance of an act of assembly passed on the 10th April 1807, 8 St. Laws 248, the chief justice delivered the opinion of the court, having heretofore determined that the exemplification of the judgment in connecticut was good and legal evidence, though unstamped, the judgment of the Common Pleas of Luzerne county was

reversed; and the record remitted thither for further proceedings thereon. No reasons were assigned.

Brackenridge, J. delivered the following opinion.

This is an action of debt, and the plaintiff declares on a judgment of March term 1775, of the county of Litchfield in the state of Connecticut, and states the consideration of the judgment to be a book debt, and the costs and charges of the suit, whereof the testator was in his life-time convicted, as by the records of the same court, &c., which judgment remained in full force and effect not satisfied or reversed, wherefore action, &c. To this the defendants plead *nul tiel* record; to which there is the replication *habetur tale recordum* and issue. On the 22d April 1802, on trial of this issue to the court, the plaintiff produced in evidence, in support of his declaration, a certain paper, purporting to be an exemplification of the record of the judgment obtained in the Court of Common Pleas of the county of Litchfield aforesaid, in the suit of George Frey v. Benjamin Harvey, the testator, *prout palet* the exemplification of the record of the judgment obtained in the Court of Common Pleas of the county of Litchfield aforesaid; which paper was overruled by the court, and which is here transmitted, and purports to be an exemplification of the judgment of the court of Connecticut, and of the proceedings of the said court on which the judgment has been entered, and purports to be under the seal of the said court of Connecticut, and certified by Frederick Wolcott, clerk of the said court, to be a true copy, on the 2d February 1797; and also purports to be attested by the chief judge of the said court, and witnessed under his hand on the 15th November 1799.

By the 4th article of the constitution of the United States, sec. 1, "full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state, and the congress may by general laws, prescribe the manner in which such acts, records and proceedings may be proved and the effect thereof." The question here arises, whether the judgment of the colony became a record of the state on the change of government, and within the provision of this article. It is within the same reason; and I take it to have been with a view to the inconvenience that had before existed, that the provision has been introduced. The record of a foreign court was not evidence to the court, and must go to the jury proveable by testimony. In the nature of the case, it could not be otherwise; because the judge could not be supposed to know the seal or attestation of the foreign court, so as to try upon inspection. For this, or for other reasons, it

was a principle that a foreign judgment could not be declared upon as a record and *nul tiel* record was not pleadable. Nor indeed was a foreign judgment on an issue to the jury, considered as conclusive evidence of the subject of it, but "impeacheable by showing the injustice thereof, or that it has been irregularly or unduly obtained." In *Walter v. Wittar*, Doug. 4, the doctrine, as it would seem, is carried further, that the original merits of the controversy are examinable. For Lord Kenyon would seem to have understood it in this point of view, from what he is made to say in a case reported in the note, where he is represented entertaining serious doubts concerning the doctrine laid down in *Walter v. Wittar*, that foreign judgments are not binding, and that the discussion of those rights could be opened, which had been finally and lawfully settled; against which he enters his protest, and quotes Lord Mansfield in *Moses v. M'Farland*, that "the merits of a judgment can never be overhauled by an original suit, either at law or in equity; but till the judgment is set aside or reversed, it is conclusive as to the subject matter of it, to all intents and purposes." 5 East 475, note.

Judgments in the courts of the colonies, even though in the particular colony courts of record, yet were not put upon the footing of courts of record in the mother country of Great Britain; and even with respect to each other among themselves, the same principle of jurisprudence was introduced; and the record of one colony was not considered as a record in the other, or pleadable as such, but must be proved on an issue to the jury; and as to the effect of such a foreign judgment when proved, it would follow most probably the determinations of the country from whence we drew our jurisprudence, whether they were that the consideration of the judgment should be traversed again, or that it should be impeachable only by showing irregularity, and that it was unduly obtained. For I see a great difference between the admitting such a plea as will avoid the judgment on the score of fraud or irregularity, and such as will let in a consideration of the original matter in issue. In the one case the judgment remains *prima facie* evidence; in the other, it is a nullity. It was a consideration of those difficulties, most probably, that introduced the provision of the 4th article of the constitution. By this a record of the judicial proceedings of the one state must in a sister state be considered as a record; but the manner of proving, and the effect when proved, shall be prescribed by congress. By an act of the 26th May 1790, the congress have prescribed, that the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the said court annexed, if there be a seal, together with a certificate of

the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the state, from whence the said records are, or shall be taken.

A question here arises, whether a record so proved shall go to the court on a verification?

Before the union of Great Britain and Ireland, a record of the Irish court was not pleadable as a record; and even since the union, it cannot be offered to the court of England with a verification, but with a conclusion to the country. For though since the union such judgments may be records, yet they are only provable by an annexed copy on oath, the veracity of which is only triable by a jury. There is no method of bringing the original record into court, and consequently no way of trying its existence, but by an examined copy, and that verified on oath, of which a jury can only judge and not the court, by whom the question of the identity of their own records is properly determinable, or if pleadable at all, must conclude to the country and not with a verification. 5 East 473. It would seem to me, that it was an object of the act of congress in pursuance of the constitution, to relieve against the like difficulty in these states, where the distance of places renders it so much more inconvenient in the adducing testimony, on an issue to the jury to prove the existence of a record; and if after this provision of the act, "record or no record," must go to the jury, and the seal proved, and the hand-writing of the attesting clerk and the certifying, what is there that would seem to have done to facilitate the proof of the existence of the record? Proof therefore in the manner prescribed by the act, would seem to me to go to the court, provided it has been the law or usage of the court from whence the record has been taken. In the case now before us we have no plea, which admitting the record, goes to avoid it by impeaching its justice or regularity; nor is there any averment of the law or usage of Connecticut, which would take issue to the country; but the matter stands simply on the question, record or no record? and all the court would seem to have had to inquire was, as to the existence of the record on the proof offered. This proof would seem to have been according to the act of congress of the 26th May 1790, prescribing the manner of proof. But by a subsequent act of the 6th July 1797, a stamp is required to any exemplification of what nature soever, that shall pass the seal of any court; and by sec. 13, no such deed, instrument or writing, shall be pleaded, or given in evidence in any court, or admitted in any court as available in law or equity,

until it shall be stamped ; which act, by a supplement thereto, was to take place after the 30th June 1798, and continued in force until the 30th June 1802. The exemplification in this case was made out and certified before the stamp act, but not before it was offered in evidence, on which ground it is presumable it was overruled, that is, considered as incompetent, in which the court would seem to have erred. For the act requiring a stamp would seem to have respect to such exemplifications or writings, as should pass the seal of any court after the date of the said act. The words are, “ any exemplification of what nature soever that shall pass the seal of any court ;” and it is a deed or instrument of writing charged with the payment of a duty, that shall, contrary to the true intent and meaning thereof, be written or printed which is rendered incompetent to be given in evidence. But the writing in this case offered, had passed the seal of the court before the existence of the act, and might be given in evidence on the same principle, that we admit in evidence a paper not under seal, from an office which had not a seal at the time the document had been obtained and was certified, though the office has since obtained a seal, and the annexing of it becomes necessary to all the official papers that shall be certified, for the purpose of being offered in evidence. For I do not conceive the exemplification as taking date from the certifying of the judge, which was after the act requiring a stamp was in operation. For it was not until it had passed the seal of the court that it would come to the judge to be certified ; and without which certificate, it would have been an exemplification and evidence before a court in the state where it issued ; and it was only to the proof that it passed the seal of a court, and to make it evidence before a court out of the state, that the certificate became necessary.

But in *limine*, in the order of argument in this case, though at the conclusion as it was offered by the counsel for the defendant in error, the objection occurs, that though a paper purporting to be an exemplification, has come upon the return on the writ of error, yet it does not appear to be a part of the pleadings ; and *non constat*, that it is the paper which was offered as an exemplification and overruled by the court below.

It is regularly true, that a bill of exceptions ought to be upon some point of law, either in admitting or denying of evidence, or some matter of law arising upon fact not denied, in which either party is overruled by the court. Bul. Ni. Pri. 316. Tidd 576-7-8. Whence it would seem, that the *trial* record must appear in the allegations, and that the overruling may be made a subject of a bill of exceptions.

A bill of exceptions is founded upon some objection in point

of law to the opinion and direction of the court, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it.

In these cases, it is enacted by stat. Westm. 2, 13 Ed. 1, c. 31, that if the party write the exception, &c., the justices shall put their seals, &c. It is either tacked to the record or not. And the statute extends not only to all pleas dilatory and peremptory, &c., and to prayers to be received, oyer of any record or deed, or the like, but also to all challenges to any jurors, and any material evidence given to any jury, which is overruled by the court. 2 Inst. 426, 427.

I have not found, nor was there produced by the counsel, any entry or form of a bill of exceptions, or case, where it was taken to the judgment of the court, on a plea of *nul tiel record*; because it is the record itself that it is produced and not an exemplification. But with us, under the constitution of our courts, and making an exemplification evidence, the reason ceases, and the bill of exceptions ought to have place and will have place; and if it has not been in precedent heretofore it will hereafter. It seems to be expressly noticed by the above words of Lord Coke, and absolutely necessary, unless the exception has been set forth in the pleadings, and by this means the paper offered had been tacked to the record. This might be done by the plaintiff under a profert. Records of the same court need not be proffered to the court. Bull. 252. This would imply, that a record not of the same court must be proffered to the court. In an action of debt, profert is matter of substance; and wherever the plaintiff is bound to make a profert, the defendant is by law entitled to oyer. *Ibid.* But if the plaintiff has not declared with a profert and brought the writing into court, and tacked it to his declaration, as he might do, the defendant may pray oyer and tack it to his plea if he chooses, but he is not bound to do it.

In the Weaver's company, *qui tam* v. Ferrest et al., 2 Stra. 1241, the plaintiffs set out their charter, with a profert. The defendants demanded oyer and had a copy of the charter delivered to them; after which they put in the general issue of *nil debet*, taking no notice of the oyer. The plaintiffs made up the issue, and inserted the prayer and oyer at the head of the pleas, and demanded to be paid for it. The defendants moved to expunge it; for though the defendants had a right to see, whether the plaintiffs may sue, yet they are not bound to insert the oyer, but may plead to the merits. On the other side, it was insisted, that the demand, and giving oyer is the act of the court, whose acts either party has a right to record. But the court held, that if the plaintiffs would avail themselves of the letters patent, they ought to do it, by praying them to be enrolled at the head of their replication, and

ought not to do it at the defendants's expense. When defendant praysoyer of the bond and condition, and it is recited in *hæc verba*, the condition becomes parcel of the declaration. The defendant afteroyer ven, may either set forth theoyer in his plea or not, at his election. If he set it forth, the court must adjudge upon it as parcel of the record. But the defendant is not bound to set it forth in his plea; and if he do not, the plaintiff may pray an enrolment, and so make it part of his replication. Tidd.

If the defendant praysoyer, and afterwards delivers the plea, without making theoyer part of it, the plaintiff may take up the issue withoyer; for the pleadings are supposed to be *ore tenus* at the bar, and a record is to be made of what is done there. 2 Barnes 266, Weaver's company v. Ware.

If a bond is brought into court,oyer is grantable only the first term; for afterwards it is adjudged to be in the possession of the party. The same law of a recognizance, which is a pocket record. 1 Crompt. 134. 1 Ld. Raym. 84. Hence it appears, that it does not follow, that onoyer, the writing necessarily remains in court.

From these *dicta*, and the like to be found in the books and from the nature and general rules of pleading and making up records, it is clear, that in England, a paper could not be known judicially, but as coming up under a bill of exceptions or tacked to the record on a profert, to the plea afteroyer, or to the replication before issue joined; and even where the pleadings are *ore tenus*, as with us in a great measure on every case, yet it would seem necessary, that it may appear to be the identical paper that was overruled, by other evidence than what is dehors the record. It has been returned with the writ of error, as a paper connected with the judgment; and it has been argued upon by the parties represented by their counsel, as the identical paper that was overruled. And I feel it to be an objection to defect of form and am willing to assist to get at the substance, and real fact of the case; but it seems impossible, otherwise than by the court undertaking to know, what does not directly appear on the record. A jury may presume and infer from the probable; but a court is confined to what is on the record, and makes parcel of it. I can see no way to get at this paper in strictness, but by giving leave to discontinue the writ of error, and getting this paper attached before another writ of error is brought, final judgment not having been yet rendered in the inferior court. In that case, the judgment would be reversed, and the same thing attained, which is done by reversing the judgment now. But as the court, myself excepted, think themselves warranted in considering the paper as before them, or for other reasons warrant-

ed in reversing the judgment, the same justice is attained and without delay with which I am satisfied.

Judgment of the Court of Common pleas of Luzerne county reversed, and the record remitted.

JOHN SHOCK *against* JOHN M'CHESNEY.

Action of malicious prosecution will lie, after a criminal prosecution begun, though no indictment has been preferred. Aliter of slander. An amendment will not be granted, which gives the plaintiff, a new substantive ground of action, and takes from defendant the right of pleading stat. of limitations.

MOTION for a new trial. It was an action of slander, tried at Harrisburgh, before Yeates and Smith, Justices, on 3d October 1799, at Nisi Prius, when a verdict passed for the plaintiff and \$55 damages were assessed.

The words charged, were words asserting before a justice of the peace of Dauphin county, that the plaintiff had been guilty of forgery in erasing and altering the time of payment in a note payable to himself. It did not appear by testimony, that the defendant had used the expressions at any other time or place, but before the justice. In pursuance of the accusation, the plaintiff was bound over to appear at the next sessions to answer the charge, and was discharged at a subsequent sessions, no indictment having been preferred against him.

The motion for the new trial was argued in the absence of the plaintiff's counsel, by Mr. Ingersoll, for the defendant, in Philadelphia, last March term; and the cause being transferred to the middle district, by the late act of 10th April 1807, (8 St. Laws 248,) the argument was again resumed by Messrs. Hopkins and Elder, for the defendant, and the motion opposed by Messrs. Montgomery and Fisher, for the plaintiff.

Arguments for the defendant. If no suit will lie under the circumstances of this case, or if the plaintiff has misconceived his action, in either case, the motion for the new trial will prevail. The law protects witnesses in criminal prosecutions, on principles of public policy. Nothing less than corruptness of heart will render them punishable; not a mistake of judgment. The law on this subject is fully settled. 4 Co. 14, 15. 1 Saund. 131, 132. Williams's note, 2 Inst. 228. Lord Eldo lays it down, that it would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of preferring their complaint, should be deemed actionable. 3 Esp. Rep. 83. See 2 Burr. 807. And here the defendant acted under his real impressions, and a belief of the fact. He was proceeding legally to punish it, but never repeated the words.

Yet if any action will lie, it must be a suit for malicious prosecution, wherein probable cause is a good defence. It is not so in slander; and by changing the nature of the action, the defendant has been materially injured. The judges who tried the cause declared their opinions, that it seemed to them an action of malicious prosecution would not lie for a malicious prosecution, grounded on a *crimen imposuit*, where no indictment had been preferred to the grand jury. But the expressions of Buller J. in 2 T. R. 231, though they may have that aspect in the first instance, only go to show that the word "acquitted" and not "discharged" as applied to the plaintiff, is the true form of declaring in malicious prosecution. In *Fuller v. Cook*, 8 Leon. 101, the whole circumstances of a case similar to the present, are disclosed in the declaration; there the court take this difference. Where one whose goods are stolen, comes to a justice of the peace, and shows him the matter, and prays that the matter may be examined and such a one is examined upon it, no action lies: but if such a person in such a case will expressly say, "that such a one hath stolen," &c. and procures a warrant on such surmise to arrest the party, an action on the case will lie. Slander and malicious prosecution are joinable. A case occurs in H. Bla. 78, where there were five counts for words spoken, and one for maliciously and without probable cause, causing a justice to issue a search warrant to search for a dog supposed to be stolen by the defendant, &c. though no indictment had been exhibited, a defence was made on the last count, on the ground of probable cause. Probable cause is a decisive answer to an action of malicious prosecution. 3 Espin. Rep. 7. 3 Bla. Com. 126. Such action will lie for maliciously procuring one to be indicted, though the indictment be insufficient. Gilb. Rep. in B. R. 185. In *Leigh v. Webb*, 3 Espin. Rep. 165, an action for malicious prosecution was sustained, though no indictment had been preferred, and the plaintiff was nonsuited, because his evidence did not support the declaration: but it is an authority in point as to the present question; and so it was ruled in a late case in Philadelphia between by the chief justice at the last court of Nisi Prius there held. A contrary doctrine would be attended with many evils. It would naturally urge the accuser to go on with the prosecution, in order to shelter himself; his interests would not be embarked with his passions. Individuals prosecuted injuriously for petty misdemeanors would be protected, unless their losses were enhanced by indictments; and the grossest injuries would thus be perpetrated with impunity. An action will not lie against a party suing out a writ, unless malice be averred. 1 Boss. and Pull. 388. Evidence of actual malice must be given, in an action for maliciously holding one to bail. 2 Boss. and Pull. 129.

E contra for the plaintiff. Malicious slander though under the seeming garb of justice, gives a cause of action. Words spoken by counsel maliciously in a suit, are the subject of an action. Cro. Jac. 90. 91. A mockery of justice under the forms of law is punishable. 1 Hawk. 354. Malice must have been established in the present suit; otherwise the plaintiff could not have recovered. Where a verdict passes for the plaintiff, in slander the court will presume malice. 1 Lev. 119.

It seems singular, that one is accountable to another for slanderous words, the truth of which he cannot prove; and yet if he inflicts an additional injury by commencing a criminal prosecution, but stops short in it, that he is no longer amendable for the slander. Our feelings revolt at such doctrine. A malicious prosecution is founded in this, that a legal prosecution has been carried on without a probable cause. 1 T. R. 544. The plaintiff must procure a copy of the indictment and acquittal. 3 Bl. Com. 126. And the court need not grant this copy unless in a case of felony. 1 Bl. Rep. 385. In other cases therefore, the party would be dispunishable in this form of action. But the plaintiff must also show that the suit was at an end. Doug. 215. The forms of pleading, it is said, show what the law really is. But a declaration in malicious prosecution, that the plaintiff was discharged, is not sufficient; it must aver that he was acquitted. 2 T. R. 231. The prosecution must appear to be fully ended. *Ib.* And hence it is, that a malicious prosecution will not lie upon a *nolle prosequi* entered on an indictment found. 1 Salk. 21. 6 Mod. 261. 2 Salk. 456. Because the party may go on notwithstanding with the prosecution. And may he not do the same thing here? What will prevent the defendant here from renewing his former charge of forgery? But even admitting, that an action of malicious prosecution might here have been maintained, it is sufficient for the plaintiff's purpose if slander would also lie. And the two forms of action are joinable. Lofft. 771. S. C. Cowp. 230. Suppose the justice had not thought proper to bind the plaintiff over upon the complaint, could he not have supported an action of slander?

At all events the defendant should here have pleaded a special justification. On *non cul* in slander, the truth of the words cannot be given in evidence even in mitigation of damages. 2 Stra. 1200. The truth of the words charged can only be shown under a special justification. Bull. 8, 9. Slanderous words from rumour have been held no justification. 7 T. R. 17. If the defendant had pleaded specially, the plaintiff might reply the speaking of the words at another time and place. 2 Keb. 361. See 2 Burr. 107. Hob. 192.

If injustice has not been done the court will not award a new trial,

to turn the party round to another form of action. 2 Barr. 935. 1 Wash. 150. After verdict, the court will presume every thing to have been proved, which was necessary to sustain the plaintiff's action. Cowp. 275.

The case cited from 3 Leon. 101, makes strongly for the plaintiff. The circumstances of that case are admitted to be similar to the present. It does not appear to be an action for malicious prosecution, though the case is fully stated on which the plaintiff grounded his action, and the want of probable cause is not averred in the declaration. There on a special verdict the court held the suit maintainable.

Yeates, J. Neither Judge Smith nor myself are ashamed to admit, that in the decision of this cause at Nisi Prius, we were mistaken in the principle which governed our opinion. We were misled by the authority in 2 T. R. 231, and the cases in 1 Salk. 21. 2 Salk, 456, that malicious prosecution will not lie, where an indictment has been found and a *nolle prosequi* entered. The law does not seem to discriminate accurately on this subject, when the prosecution shall be considered at an end. The case has been much more fully argued now; and we freely admit, that from the new authorities, which have been adduced by the defendant's counsel, the plaintiff has misconceived his suit, by bringing an action of slander, instead of malicious prosecution. In the latter case, the defendant would have had it in his power to show a probable cause of complaint to the justice for the supposed forgery, as a ground of defence to the civil action. By proceeding in an action of slander, the defendant was deprived of this right; and we therefore are of opinion that a new trial be awarded. See *Secar v. Babcock*, 2 John's N. York Reports 208.

The other members of the court assenting hereto a new trial was awarded.

The plaintiff's counsel then moved to amend the declaration by adding a count for malicious prosecution, under sec. 6 of the arbitration act passed 21st March 1807, 7 St. Laws 562. All suits are to be tried on their true merits, and not to be set aside for informality. The words of the act are very large, and empower the court to permit an amendment. The plaintiff was taken by surprise on the trial, by the plea of justification being withdrawn after the jury were sworn.

This was opposed by the defendant's counsel. This suit was brought in the Common Pleas to August term 1797, and an amendment is now prayed for in July 1808. The delay has been very great.

The amendment required, essentially alters the nature of the action ; and moreover takes away the right of the defendant to plead the statute of limitations. At all events, the plaintiff should pay the costs until the present time.

The plaintiff in reply. The delay is not solely imputable to us. The defendant removed the cause when the suit was ready for trial below ; and his counsel must share the blame of not arguing it earlier in the city. The court will grant leave to amend in penal actions, where the amendment does not introduce any new substantive cause of action. 7 T. R. 155.

Per cur. Here certainly has been delay ; but it is said to be imputable to both parties. We have the power of amending at common law ; but by doing so in this instance, we give the plaintiff a distinct substantive ground of suit, which he never contemplated before ; and prevent his opponent from sheltering himself under the statute. This is wholly inadmissible.

The clause was introduced into the arbitration act to prevent non-suits for matters of form, and to bring the true merits of each case before the court, where the controversy remains the same.

Yeates, J. said a motion of the like kind was denied on argument in Philadelphia, where the canal company asked to introduce new instalments on notes given by the stockholders into their declarations.

Motion denied.

Lessee of Joseph WIRT *against* JOHN STEVENSON.

Lessee of JOHN KEBLE *against* THOMAS ARTHUR.

The proceedings on an appeal from the Circuit Court may be filed on the first day of the term in bank before the court has begun to sit, but not after, unless on special grounds.

MR. DUNCAN for the defendants moved to dismiss these appeals from the last Circuit Court held for Centre county, the records of the proceedings not being filed before this term, pursuant to the 4th section of the act of 20th March 1799. 4 St. Laws 362. He admitted that the appeals were entered and the proceedings filed on the first day of the term before the court commenced sitting.

Per cur. The motions must be denied.

We have in former instances, construed the words to mean before the term commences ; but after that period, appeals cannot be received unless on special grounds.

Lessee of JAMES MOODIE et. al. *against* JOHN VANDYKE et. al.
Same plaintiff *against* DAVID IRELAND et. al.

When an appeal from the Circuit court is given to the next term it means the term after the termination of the Circuit court.

MR. DUNCAN for the defendants made the like motion in these cases, which were appeals from the Circuit Court of Northumberland county. The records were not filed until after the court had risen on the first day of this term.

Mr. D. Smith for the plaintiff opposed the motion. The legislature could not mean to impose on a party a thing impracticable to be done. The jury in the first cause gave in their verdict but a few days before ; and in the last cause, not until the Saturday evening preceding this term.

Early application was made to the clerk of the Circuit Court for the copies of the proceedings ; but he found it impracticable to make them out in due time. Besides it will not be denied, that the Circuit Court for the county, is still sitting on their own adjournments ; and thus we are within the words of the section.

The court after some days advisement, declared, that they were not disposed to discourage appeals. It was a fair construction, which did no violence either to the words or spirit of the act to say, that next term, meant the term holden after the termination of the Circuit Court.

Motions denied.

JAMES IRWIN, for the use of JOHN SIMPSON *against* WILLIAM REED and JOHN M'MAHON.

Depositions of witnesses, who became interested at the time of trial, and were in full life, refused in evidence.

APPEAL from the decision of the Circuit Court of Northumberland county.

The cause was tried at Sunbury, on the 11th October 1804, before Shippen, late C. J. and Brackenridge, J., and a verdict passed for the defendants. The court overruled a motion for a new trial.

The ground of appeal was, that the court had refused in evidence, the depositions of Jeremiah and Jesse Simpson, taken under a rule of court pending the suit, during the life-time of their father, John Simpson, the *cestui que use*. They had at the time of trial become interested under their father's will, were appointed his executors, and were made parties to the suit.

Messrs C. Smith and C. Hall on the part of the plaintiff contended, that their testimony ought to have been received. They were wholly free from interest when they were sworn. The objection of their being sons went merely to their credibility. The act of God ought not upon any reasonable principle to prejudice the true merits of the suit; and courts of justice were now disposed to let in all possible light on the trial. They were clearly witnesses in a court of equity. 2 Vern. 699. 2 Atky. 615. 5 Vez. 40. 1 Wms. 289. And the rule at law ought to be the same, where the consideration of a note, as was the present case, was attempted to be inquired into. In a cause at Nisi Prius in York county, such depositions were allowed on the motion of our adversary.

Mr. Duncan for the defendants insisted, that this court would govern themselves by the plain rules of law, and not adopt chancery decisions contrary thereto. These depositions were taken to be read in evidence, in case of their death, absence out of the state, or inability to attend on the day of trial. None of these events had arisen; on the contrary, the witnesses then were present in court attending the trial as parties. On this ground their depositions could not be read. Nor could they have been personally examined. It was a decisive objection to them, that they were parties, and liable to costs in the first instance. 3 East 13. Where a suit had been brought in the name of one, who afterwards became bankrupt, though the assignees had given security for costs, the bankrupt was obliged to release his share of the surplus before he could be sworn. 4 Dall. 137. It is fully settled, that a guardian, or *prochein amy*, instituting a suit, could not be a witness. It appears by express decisions, that such depositions are not admissible in a court of law. See 2 Ld. Raym. 1009. 1 Salk. 286. 2 Salk. 555. 691. 1 Stra. 101. 5 Mod. 9, 163, 277. 2 Wms. 564. 2 Bac. 305. Espin. 756. Peake's Compend. 39.

By the court. The testimony offered was clearly inadmissible as evidence, under adjudged cases, for the reasons which have been offered by the counsel for the defendants. We are obliged to proceed by the common law rules of evidence, however hard they may appear in a particular case. Upon the same principle of chancery practice, that these depositions were urged on the court, a party may insist on examining the defendants upon oath, and fully purge his conscience. This has never been done in Pennsylvania, and we cannot now set the precedent.

Judgment affirmed.

JOHN FINNEY administrator of ISABELLA FINNEY, plaintiff in error
against ADAM HARBESON and MARTHA his wife, MARY FINNEY,
JANE FINNEY, ISABELLA FINNEY, MARGARET FINNEY and ESPY FINNEY.

The report of auditors in account render must state a special account.

WRIT of error to the Common Pleas of Dauphin county.

It appeared by the record, that the defendants in error had brought an action of account render against the now plaintiff, and had declared against him as their bailiff of several specific articles and of cash to merchandize, and make profit for them. Judgment *quod computet* was entered and auditors were appointed, who reported that they found due to the defendants in error a balance of 303l. 1s. 7d. Exceptions were taken thereto, and particularly that the auditors had not exhibited a statement of the accounts or items on which the plaintiff in error might take issue. But the court below rendered an absolute judgment for the sum found due by the auditors.

The case was submitted to the court without argument by Messrs. Duncan and Elder for the plaintiff, and by Messrs. Fisher and Laird for the defendants.

The court said, nothing appeared in the record showing an intention that the auditors were to be considered as general referees under our practice. At common law, the report not stating a special account, was undoubtedly erroneous.

Judgment reversed.

Certiorari to the Quarter Sessions of Mifflin county, in the case of a private road from the house of JOHN KYLE, to intersect the Penn's Valley road.

No general rule can be laid down, as to the definite points where a road shall begin and end, being necessary to be stated in the petition. *Id certum est quod certum reddi potest*. A road leading from a certain house into a public road, may be confirmed as a private road, though the viewers have not reported that it was necessary as a private road. And the order of confirmation need not specify how it must be opened and kept in repair.

FROM the record it appeared, that John Kyle had petitioned for a road from his house to the Penn's Valley road, at August sessions 1804. Viewers were appointed thereon, but no return having been made at November sessions following, the order was continued. The viewers reported to January sessions 1805, "that there was a necessity for a road in their opinion," and returned the same by courses and distances, together with

a draft thereof (without distinguishing whether it should be a public or private road.) At the same sessions, a petition was presented by Matthew Taylor against the road, stating the same to be unnecessary and of no use to Kyle, whereupon reviewers were appointed; but no return having been made to April sessions following, except by two of the reviewers, the court confirmed the road as a private road, to be laid out 16 feet wide, and to be opened by Kyle the petitioner.

Mr. Watts took the following exceptions to the proceedings:

1st. There is no definite point stated at which the road shall end in the original petition. This has often been held necessary. The Penn's Valley road is too vague and uncertain. Where does it begin and end?

2d. The viewers have not stated in their report, whether they judged the same necessary for a public or private road. This is required by the express words of the act of 6th April 1802. 5 St. Laws 179.

3d. The court have not, when they confirmed the road, directed that it should be opened and kept in repair at the expense of the persons petitioning for and using the same.

To these objections, Mr. Duncan answered.

1st. The Penn's Valley road is known specially by that name. It is a large public road much used, and the legislature have granted money for its improvement. It is therefore a definite point, where the road is to end.

2d. The original petition is virtually for a private road, from Kyle's house to the great road, which appears to be little more than one mile distant. The words of the 17th section of the act designate the roads thus described as private; and the viewers had no discretion to lay it out as a public road.

3d. The keeping of the private road in repair, by persons for whose use it is laid out, follows the confirmation as a necessary result, under the words of the proviso in § 17.

Tilghman, C. J. The first exception is grounded on the supposed want of definite points, where the road applied for shall begin and end. No general rule can be laid down which shall universally prevail in such cases. But here was a *terminus a quo*, the dwelling house of Kyle, and a *terminus ad quem* the Penn's Valley road, well known as a great road, and the distance between them not much more than

one mile. The maxim *id certum est quod certum reddi potest* is applicable here ; and I can see nothing in the first objection.

I also incline to think the second objection ill grounded ; though it is not free from doubt. I compare the 1st and 17th sections of the act together ; and the words in the latter section, “ and if such road is found to be necessary, ” have great weight with me, as they vary from the phraseology of the former section. Besides nobody is injured ; the parties who apply for, and use the road, pay all damages to the owners of the ground, through which it is carried ; and moreover, are obliged to open it and keep it in repair at their own expense. And as to the last exception, it was not necessary, that the court should specify in their confirmation, what the law had provided for, in plain and direct terms.

Yeates, J. The first objection against this road, is fully answered by the remark, that the petition of Kyle pursues the very terms of the 17th section of the act of 6th April 1802.

When the sessions confirm a private road and direct its breadth, the law draws after it the consequences of its being opened and kept in repair, by the persons applying for, and using the road ; but the same need not be specified in the order of confirmation.

Captious exceptions against roads should not in my idea, be indulged ; but the substantial parts of the act should certainly be pursued.

It seems to me, that the return of the viewers upon this occasion, is substantially defective. The 17th section directs, that upon application for a private road, the return of the viewers shall be made “ in the same manner, as is before directed by this act. ” By recurring to the 1st section, we find that mode prescribed, viz. “ the viewers shall make report of the road, stating particularly whether they judge the same necessary for a public or private road, ” &c. And the directions of the law in this particular not being complied with, I am of opinion, that the return of the viewers is erroneous. But I declare this opinion with some diffidence, the other members of the court thinking otherwise.

Smith, J. The viewers had no power to return this as a public road, and the second objection fails on that ground, in my opinion.

Mr Watts observed, that Kyle’s petition did not pray for a private road.

Smith, J. The road was from his house into the Penn’s Valley

road ; which in the language of the 17th section is a private road.

Brackenridge, J. concurred with the chief justice.

Judgment of the sections affirmed.

GEORGE ALBRIGHT and JOHN ALBRIGHT, plaintiffs in error *against*
lessee of JAMES M'GINNIS.

Where a judgment of the Common Pleas has been reversed on error, but the record not remitted, nor a *ven. fa. de novo* awarded, and there has been a trial on the merits in C. B. court will order those rules to be entered *nunc pro tunc* to support the verdict.

WRIT of error to the Common Pleas of Cumberland county. The facts on the writ of error and record returned, appeared as follows :

The defendant in error recovered the lands in question on a trial in October term 1797, wherein a bill of exceptions was sealed. Judgment was rendered the same term ; whereupon a writ of error was brought in the Supreme Court, and the judgment reversed and restitution awarded, in December term 1799. The record was brought back to the Court of Common Pleas, but without any direction of the superior court for that purpose ; and in November term 1801, a rule for special jury and view, was obtained at the instance of the plaintiffs in error. The cause came on again to trial, in the Court of Common Pleas on the 2d February 1802, when the defendant in error obtained a second verdict. Reasons in arrest of judgment were filed, stating the reversal of the first judgment in the Supreme Court, and that the record had not been remitted by their direction, nor had they awarded a *venire facias de novo*. But the Common Pleas overruled those reasons, and rendered judgment on the last verdict, on the 24th July 1806, whereupon the present writ of error was brought.

Mr. Watts, for the plaintiffs in error, contended ; that every thing which had been transacted in the suit in the court below, after the first judgment was reversed, was a mere nullity. The first writ of error tied up their hands, and unless the record was remanded, or a new suit brought, they could have no jurisdiction over the subject matter. The awarding of a *venire facias de novo*, on a judgment being reversed by the Supreme Court, has commenced very lately.

Mr. Duncan, for the defendant in error. The reversal in this court went on the ground of improper evidence being received in the Common Pleas on the first trial. It was not a final judgment. But in

such case it is now settled, that they will remit the record, and order a new trial. Why shall it not be done here? The defendants below appeared voluntarily, and took their rules in the usual course, without objecting to the proceedings. The cause has been tried on its merits, and those defendants after taking their chance on the trial for a verdict, ought not now to object to what has been done.

Tilghman, C. J. delivered the opinion of the court. This cause was originally tried in the Common Pleas, and a verdict had there for the plaintiff, and judgment. It was removed on a writ of error to the Supreme Court, on a bill of exceptions, and the judgment of the Common Pleas was reversed. The Supreme Court made no actual order to remit the record; but the plaintiff below considered the cause as still depending in the Common Pleas, and a rule for struck jury and view was entered there at the instance of the defendants; after which the cause was tried and a verdict and judgment entered for the plaintiff, on which this writ of error is brought.

This court are of opinion, that inasmuch as they had a power to remit the record and award *venire facias de novo*, and as the parties have proceeded to a trial, and the cause has been tried on its merits, it is proper that an order to remit the record, to the Court of Common Pleas, and an award of a *venire facias de novo*, should now be entered, as of the term when the first judgment was severed. This being done, the proceedings will all be regular. This court will always support verdicts, where there have been trials on the merits, when they have it in their power. Let the judgment of the Court of Common Pleas therefore be affirmed.

EDWARD THURSBY, assignee of HENRY VANDERSLICE, plaintiff in error
against administrators of WILLIAM GRAY.

A creditor is not bound to sue on a bond when the same becomes due, under the penalty of losing the surety therein.

WRIT of error to the Common Pleas of Northumberland county. The case was this, as stated by Mr. President Cooper, in his written opinion filed, agreeably to the act of assembly.

The suit was brought in debt on bond. Plea payment with leave to give the special matter in evidence. It appeared on the trial at Sunbury, 27th August 1806, that on the 8th February 1803, there was a sale of goods taken in execution as the property of James Cummings, esq., when William Spring became a purchaser to a considerable amount. On the 11th February 1803, he

said William Spring, together with William Gray, since deceased, entered into a joint obligation for the payment of 125l. on the 10th August following. The goods sold to that amount were sold to Spring only, Gray having purchased only to the amount of 1l. 16s. at the sale, which were charged to Spring, and not to Gray. Spring was the principal and Gray no more than the surety in this transaction. It appeared in evidence, that Spring was a storekeeper in credit and reputation, carrying on an extensive trade at Northumberland and afterwards at Columbia, from the time of the purchase to the month of November 1804, during which time he might have been applied to for the amount of the bond with reasonable prospect of success; but in the fall of that year, his circumstances became, and have ever since remained desperate. This suit was brought to January term 1806, and upon the whole circumstances of the case, the court were of opinion that if Gray was considered as the surety of Spring, he was surety no longer than till the money became due, according to the tenor of the obligation. A surety is entitled to say, "I will guaranty the principal to such a day and no longer;" and if the obligee choses to trust the principal a longer time, he does it at his own risk, and not at the risk of the surety.

The jury found for the defendants, and judgment was rendered for them; whereupon this writ of error was brought.

The court desired the counsel for the defendants in error to begin. They contended, that their clients were not answerable. The cases in the courts of equity were very strong on this head; and there was no reason why their doctrines should not be extended to this state. Chancery has relieved a surety, where the bond was continued twelve years, without the plaintiff's privity. So the heir of a surety has been relieved. 20 Vin. 104. pl. 2, 3, cites Toth. 279, 280. A creditor who gives the principal debtor a further time for payment, thereby releases the surety. *Nisbet v. Smith et al.* 2 Bro. Ch. Rep. 579. The same point was afterwards decreed in *Rees v. Berrington.* 2 Ves. jr. 540. In *Stratton v. Rastall*, 2 Term Rep. 370, Buller, J. truly says, that as against a surety, a contract cannot be carried beyond the strict letter of it. It could never have been contemplated by Gray, or any reasonable mind, that he was surety for the money in any other event, than the insolvency of Spring, when the money became due. At that period, and for fifteen months afterwards, the principal was in good credit and able to pay the debt. If a loss has happened by the obligees not demanding the money, when it became due, it was his own fault; but his negligence shall not be visited on an innocent

surety. See *Law v. the East India Company*, 4 Ves. jr. 824.

The court stopped Mr. Watts, who was proceeding to the argument on the part of the plaintiff.

They saw no necessity of determining in this case, how far the decrees in chancery on this subject were applicable to our system of laws, or whether the constitution of our courts would permit an exercise of jurisdiction upon the principles of those decrees. It was sufficient to observe, that equity would not give relief in such an instance as the present to the surety, even in England. To oblige a creditor to a suit against the principal, immediately upon the day of payment of an obligation, would be injurious as well to the surety as the principal; and such an idea had never prevailed at any period in Pennsylvania.

Yeates, J. said that it had been determined in the Circuit Court at Lancaster, between Dehuff and Turbett's executors, that the grounds of the equity jurisdiction between surety and principal failed under our system, as to the point in question. No action had ever yet been framed in a court of law, in nature of a bill in equity, by a surety to compel his principal to take up the joint bond, or against the creditor to compel him to bring suit; but it had not been asserted, that no conduct whatever of the creditor should discharge the sureties.

Judgment reversed, a new trial awarded, and the record remitted.

Messrs. Hall and Evans for the defendants.

JOHN WALLACE *against* HENRY MEASE.

To entitle a party to read depositions in evidence, tho' the witnesses have been cross-examined, it must appear that the requisites of the 24th rule of practice have been complied with.

APPEAL from the decision of the Circuit Court of Dauphin county. The cause was tried before Brackenridge, Justice, at Harrisburgh, on the 24th October 1806, and a verdict given for the plaintiff for \$150 in an action of slander. A motion for a new trial was made, but the same was overruled.

Mr. Hopkins for the defendant, now urged several grounds for awarding a new trial; and among others, that the desposition of Susannah Wray had been read in evidence on the trial on the part of the plaintiff, though opposed by the defendant. Her absence was not accounted for, though it was admitted, that she

was in full life and resided about 26 miles from the place of trial. The rule for the taking of her deposition was entered on the docket as follows. "November 1st 1805, rule to take the deposition of Susannah Wray on one hour's notice, on interrogatory." Nothing appeared therein which showed that the party could entitle himself to read the deposition, without endeavoring to procure her personal attendance under the rules of the court. If the rule had been thus intended, it would have been so expressed.

Mr. Laird, for the plaintiff observed, that the witness had been cross-examined under the rule, and no injury could be done by reading her deposition in evidence. The jury would necessarily weigh her credit, and judge of the probability or improbability of her testimony. Her not being personally examined could make no difference in the merits of the cause. The judge who tried the cause observed, that the rule in this case was special, and would seem to have been imposed on the defendant, as a term or condition of putting off the trial, and the dispensing with the attendance of the witness at another time, and was not within the requisite of subpoena under the common rule. The rule of the court on this subject only applies, where a deposition had been taken *ex parte* without a cross-examination.

Tilghman, C. J. The deportment of a witness on a personal examination conduces greatly to the development of the truth. His manner of answering questions, frequently shows his indifference or bias towards the parties. Hence it is, that the common law prefers *viva voce* testimony to depositions. The 45th rule regulating the practice of the Circuit Court is general in its terms, and extends to depositions taken on a cross-examination, as well as those *ex parte*. They are not to be admitted, if the witnesses are resident within the state, and within 40 miles of the place of trial, unless duly subpoenaed, or it appears they cannot be found, after reasonable pains taken for that purpose.

We must judge from the face of the rule, as entered on the record of the Circuit Court; and it does not appear from thence, that any of the usual requisites were dispensed with. No such terms appear to have been imposed on the defendant, as the condition of postponing the trial. On the contrary, the docket shows, that the rule for taking of the deposition was entered on the 1st November as has been stated and that afterwards on the 7th November, the action was continued on account of the absence of the defendant's witnesses, and that he was then ruled to pay the costs of the term.

Judgment reversed, and a new trial awarded.

JOHN M'LENE plaintiff in error *against* HUMPHREY FULLERTON.

In deceit on the swap of horses, the whole transaction should be received in evidence.

WRIT of error to the Common Pleas of Franklin county.

This was an action of deceit on the exchange of the plaintiff's gray gelding for the black gelding of the defendant, the plaintiff alleging a warranty on the part of the defendant, that his horse was sound, though in fact he had slipped his shoulder.

The cause was tried at Chambersburgh on the 5th November 1803, when the following bill of exceptions was sealed by the court.

On the trial the plaintiff's counsel produced divers witnesses, in support of the issue of the black gelding, in the declaration mentioned, and to prove his lameness and defects as set forth therein. Whereupon the counsel on the part of the defendant offered to prove that the gray gelding of the plaintiff in the said declaration mentioned, alleged therein to have been given and exchanged for the black gelding of the defendant, was unsound. Thereupon the counsel on the part of the plaintiff, object to any evidence being given of the unsoundness of the said gray gelding as being irrelevant to the issue. And the court after argument, overruled the objection, and admit the evidence as to the value and unsoundness of the said gray gelding. Thereupon the plaintiff's counsel except to the opinion of the court, and prayed their exception to be allowed ; and the same was allowed accordingly.

The jury found for the defendant, and the court rendered judgment on the verdict.

The record was submitted to the court by the counsel on both sides without argument, as a case between two jockies.

Tilghman, C. J. The whole that passed at the time of the exchange of the horses ought to be received in evidence. It formed but one transaction, and the jury should judge upon the whole. Even admitting that the biter was bit, and that the plaintiff ought to have recovered something, the jury could not assess his damages, unless the value and soundness of the horse he had swapped was shown to them.

The rest of the court assenting hereto,

Judgment affirmed.

Messrs. Watts and S. Riddle, *pro quer*

Messrs. Brown and Dunlap, *pro def.*

GEORGE STROUP, plaintiff in error *against* WILSON M'CLURE.

If there are more than four days between the dates of the justice's warrant and return in proceedings between landlord and tenant, it is cured by the tenant's appearance and making defence.

WRIT of error to the Common Pleas of Cumberland county, to remove certain proceedings had before two justices of the peace, under the landlord and tenant act, and affirmed afterwards in that court upon a *certiorari*.

It appeared by the record returned, that the warrant of the justices was in these words :

Cumberland county, ss. The Commonwealth, &c.

Whereas complaint and due proof were this day made before William Levis and Jacob Hendel, esquires, two of the justices of the peace for the said county, that a certain James Alricks, on the 1st day of April 1797, was quietly and peaceably possessed of a certain messuage and tract of land, containing $294\frac{1}{2}$ acres, adjoining George Stroup and others, and being so thereof possessed, by his certain lease, bearing date the 16th day of March 1797, did demise, &c. to George Stroup, for one year, from the 1st day of April then next, at the rent of 20l. That the said George Stroup entered, &c. That the said term is fully ended, and that the said James, on the 1st day of January last past, did demand and require the said George Stroup to remove from and leave the same, and that the said George Stroup hath heretofore refused, &c. ; and that the said James Alricks, on the 17th day of April 1801, conveyed the premises to Wilson M'Clure. Therefore, we command you, that you summon, &c., to be and appear before the said justices on the 20th day of October instant, at the court-house in Carlisle, at two of the clock in the afternoon of that day, and that you summon, &c. Witness the said William Levis and Jacob Hendel, the 15th day of October 1801.

The inquisition run thus :

Inquisition indented and taken at Carlisle on the 20th day of October 1801, before William Levis and Jacob Hendel, esquires, two of the justices, &c., by the oaths of, &c., twelve substantial freeholders, who upon their oaths and affirmations respectively do say, that James Alricks, on the 1st day of April 1797, was quietly, &c., (as in the warrant) and that the said James being desirous of possessing the same premises, did on the first day of January last past, demand and require the said George Stroup to remove and leave the same ; that the same George hitherto hath refused, and still doth refuse to comply therewith ; and that the said James Alricks, by his deed, dated April 17th 1801, conveyed the premises aforesaid to Wilson M'Clure and the said freeholders do assess damages against the said George Stroup, for the

unjust detention of the premises, to \$3, besides costs. And thereupon the said justices rendered judgment for the said \$3, together with \$20 72 cents costs, and restitution of the premises. In witness whereof, as well the said justices as the said freeholders, have hereunto set their hands and seals the day and year first above written.

On the 4th April 1806, the Court of Common Pleas made an order, requiring the two justices of the peace to amend their return under their hands and seals, and make such return by ten o'clock next day. Accordingly they made such return under their hands and seals on the next day; and they further returned, that they inquired of the said George Stroup, whether he was willing to proceed to trial on the 20th October aforesaid, and he then expressed his willingness so to do.

Mr. Watts for the plaintiff in error, took the following exceptions to the proceedings, and assigned the same for error:

1st. That on the plaintiff alleging a diminution of the record in the Court of Common Pleas, that the two justices had made no return under their hands and seals, and that the lease stated in the return of the justices to have been made by James Alricks to George Stroup, and the deed of assignment made by the said James Alricks to Wilson M'Clure were not returned; the Court of Common Pleas refused to make a rule on the justices, to return the same lease and deed. It was absolutely necessary that the justices should make a return of these instruments, to enable the court to judge of their legal effect.

2d. The warrant issued by the justices is not made returnable within four days.

By sec. 12 of the act of 21st March 1772, 1 Dall. St. Laws 612, the summons for the freeholders, and tenant to appear, must be within four days next after issuing the precept. A special jurisdiction is given to the justices, which ought to be strictly pursued. Here the warrant was tested on the 15th October, and the day of appearance on the 20th of the same month.

3d. It is not stated that the proceedings were held at the courthouse in Carlisle.

This departure from the terms of the warrant is submitted to the court without remark.

4th. There is no legal notice to quit, found by the justices and freeholders.

Here the jury only found the notice, and the justices made a record of it and awarded restitution. The finding must be by the justices as well as freeholders. The bare signing and sealing of the inquisition by the justices is not sufficient. Besides,

the time of quitting the premises is not even found by the freeholders.

Mr. Duncan, for the landlord, answered in substance as follows:

1st. No diminution appears to have been prayed on the record. The justices have returned their proceedings under their hands and seals, and they were not bound to return the lease and deed.

2. It is no ground of complaint, that the court allowed the tenant a longer time to make his defence, than they were bound by law to do. It sounds strangely from his mouth. A conviction on the Game laws has been held sufficient, when the party was present at the reading of the information and the examination of the witnesses; and that when called on for his defence, he produced no evidence, nor asked further time, though no previous summons had issued against him. 1 East 639. Here the tenant was summoned regularly, appeared with his counsel, expressed his willingness to go on, and was fully heard as to every objection both of fact and law.

3. If the tenant appeared at any house whatever in Carlisle and made his defence, it is sufficient. No surprise can be alleged.

4th. The time to quit is never specified in such cases. The proceedings pursue the forms in Read's Appendix to his Abridgement of the laws, 456. The justices rendering judgment on the finding of the jury, and signing the inquisition, is virtually a finding by them, and a full approbation of what the jury have done.

The chief justice delivered the opinion of the court in few words on the exceptions taken:

1. The jury might either find the lease or deed in *hæc verba*, or the substance of them; but the justices were not bound to return the lease or deed to the court.

2. If even the five days between the date of the warrant and its return were improper, it is cured by the tenant's appearance and willingness to proceed to trial in this instance.

3. The tenant made a full defence before the jury.

4. The record pursues the terms of the act of assembly and is conformable to established precedents. The justices have expressed their full concurrence with the finding of the jury, and are never sworn in such case.

Judgment of the Common Pleas affirmed.

BENJAMIN PRICE and SARAH his wife *against* ROBERT JOHNSTON.
Same *against* Same.

The right of dower in the widow attaches immediately on the death of her husband, and she may be endowed temporarily, tho' there be a deficiency of personal estate to pay debts, and tho' upon a sale of part of the lands her dower will decrease in proportion.

APPEALS from the decision of the Circuit Court of Franklin county.
The case was this :

Henry Pawling of the same county, died in February 1794, intestate and without issue, leaving a widow, who afterwards intermarried with Price the plaintiff; and an only sister his heir at law, who had been married to the defendant. He died seized of valuable lands, but much indebted.

By consent of the widow and Dr. Johnston, an amicable action was entered in the Court of Common Pleas, as of February term 1795, which was referred to three persons to report what sum of money should be annually paid in lieu and satisfaction of the widow's right of dower in the lands, and the time of the year when the same should be so paid. A report was made accordingly to March term 1795, fixing the sum of 150*l.* to be paid to the widow annually on the 25th day of December, the first payment to be made on the 25th December 1796, which was confirmed by the Court of Common Pleas.

The first annual payment was duly made, but was afterwards stopped, on notice given of debts due from the intestate. Actions were brought for the recovery of the sums due in 1797, 1798, 1799 and 1800, and two of the suits were removed into the Circuit Court.

In these two suits references were entered at a Circuit Court for Franklin county, in October 1801, to three men, or any two of them, who were to inquire what sum, if any, should be deducted from the annuity in each year to the plaintiffs, on account of lands sold and debts due from the estate of Henry Pawling, deceased.

On the 29th March 1802, the referees reported as follows: "We find there is no money due to the plaintiffs on the two within suits, as the whole estate was totally consumed by the payment of debts by the defendant, which were due from the deceased at his death."

Exceptions were duly filed to the report, stating that the referees had erred in point of law, in making the widow of Henry Pawling deceased, who had but a life estate in the moiety of his lands, contribute to the heir one half of the debts due by the same Henry, which his personal estate would not pay, out of the annuity awarded to the said widow in lieu of her dower in the one half of the lands of the said deceased.

The report came on to argument before Tilghman Chief Justice, at a Circuit Court held in Franklin county in November 1805, when the same was set aside by him. The defendant appealed from his judgment, for the following reasons.

1st. For that the widow being the administratrix of Henry Powling had the power of petitioning the Orphan's Court, and could have obtained a sale of the real estate for the payment of debts.

2d. A widow is not entitled, by the laws of Pennsylvania, to dower, until the debts are paid.

3d. Special provision is made by law, respecting as well descents as the rights of widows. No distribution can be made until the debts are fully discharged; and here one debt still remains due from the estate, which exceeds 2000l.

4th. The estate, which is the foundation of the widow's claim in these suits is subject to execution, and may by law be delivered to creditors, for the payment of their debts.

Mr. Dunlap for the defendant in support of the appeal. The intestate died previous to the act of 19th April 1794, (3 Dall. St. Laws 521,) and of course the provisions of the former existing laws must govern in this case. Ib. 533. sect. 25 : The widow's claim to dower in this state differs from that in England; and must be decided by our own municipal laws.

It is a material circumstance in this case, that the widow of the intestate was his sole administratrix; and either under the 6th and 7th sections of the act of 1705, 1 Dall. St. Laws Append. 44, 45, or under the 19th and 20th sections of the act of 19th April 1794, 3 St. Laws 529, she might have obtained an order of the Orphan's Court for the sale of such part of the lands of her former husband, as would have enabled her to pay off his debts. But instead of so doing she has removed into Virginia with her second husband. The delay in payments of the debts is solely to be attributed to her own neglect; and if any injurious consequences arise therefrom, they are imputable to her own default for which she ought to suffer.

Under sect. 8, of the old act of 1705, the widow is only intitled to her share " of the *surplusage* or remaining part of the intestates lands, tenements and hereditaments, not sold or ordered to be sold by this act." The same provision is made by the second section, as to the *surplusage* of the personal estate; and such surplusage appears to be by the preceding section " what remaineth clear, after all debts, funeral and just expenses of every sort are first allowed and deducted." And by sect. 3, to insure the interest of creditors, no distribution is to be made of the goods of an intestate, till after one year be fully ex-

pired after the intestates death. Hence it evidently results, that the widow is neither intitled to her distributive share of the personal property, nor endowable of the real estate of her husband, until his debts and funeral expenses are discharged.

The lands of intestates are assets for the payment of their debts, by our laws and customs. They may be taken in execution and sold, though in the hands of a purchaser from the heir. 1 Dall. 484.

Mr. Brown for the plaintiffs. No censure can justly be attached to the widow for not applying to the Orphan's Court for an order to sell the intestates lands for payment of debts. The plaintiffs will readily concur in such an application, if the heir at law shall judge it to be advisable. But how has she been injured by the delay? Her husband has received all the rents and profits since the time of ascertaining the annuity; and if the lands have risen in value, the enhanced sum they would bring, redounds to his wife's benefit.

But the difficulty has arisen from hence, that it was judged no sale could be ordered, there being no children of the intestate. The words of the acts of 1705 and 1794, are very strong on this point, "and not otherwise."

Yeates J. They certainly are strong; and yet it was determined in Franklin county, in a case wherein I was counsel, by M'Kean, Chief Justice, on a solemn argument, that the Orphan's Court might make such order, though there were no minor children. The practice has since generally prevailed in the middle counties of the state in particular; and many valuable titles depend on that exercise of power. I mentioned this in Philadelphia on the argument of *Moliere's lessee v. Noe*, in December term 1806. 4 Dall. 451, note. But I will not say, that all the bar then present were satisfied with that construction of the law.

Mr. Brown, in continuation. Be that as it may, the widow here was not required on behalf of the heir at law, either before her intermarriage with Price or since, to apply to the Orphan's Court by petition, or it certainly would have been done. If the defendant desires it, the plaintiffs will petition the court immediately on our return home.

What they now complain of, is that the referees in forming their award, have charged them with the full moiety of the debts, considering them as holding the lands in fee simple, when they only hold it during the life of the widow. In no instance in England, has this been done. In some cases, they have been decreed to pay one-third; in others, two-fifths of a mortgage, chargeable on lands devised to a

tenant for life. 1 Equ. Ca. Ab. 117. Prec. Cha. 62. A tenant for life shall bear his proportion of a charge on the lands, that all shall not fall on the remainder man. 1 Equ. Ab. 113, pl. 4. But a remainder man can only force the tenant for life to keep down the interest of a mortgage. 2 Equ. Ab. 618, pl. 3. A lease for lives being devised in trust for A. remainder to B. in tail, A. not being one of the lives, shall contribute one third of the fine on renewal. 1 Ves. 428. If a tenant for life pays off an incumbrance on the estate, he is a creditor to the amount of the money so paid; but it is otherwise of a tenant in tail, who may make himself owner of the estate. 1 Bro. Cha. Rep. 206. A tenant for life by the late decisions, shall keep down the interest of an incumbrance, but not pay any part of the principal.* 1 Ves. jr. 234. 2 Ves. jr. 652, 666. 4 Ves. jr. 24, 32. 6 Ves. jr. 107.

It has been objected, that the widow is not entitled to dower in this state, until the debts of her husband are paid. This in some instances, cannot be accomplished for many years. Is the heir at law to receive the rents and profits in the mean time, and the widow to be in a state of starvation? On what is she to subsist? The books say, she has nothing to live on but her dower; she is favored both at law and in equity, and gets her share immediately; she universally gets an account in chancery from the death of her husband. 2 Bro. Cha. Rep. 630, 632. It is so like-wise in this government. Her right of dower attaches immediately on her husband's death. So is the 3d section of the act of 19th April 1794. By section 4, where the intestate leaves no lawfull issue, she gets one-half of the real estate, including the mansion house, where the estate can with propriety be divided. And by section 22, she may apply by petition to the Orphans' Court to have her dower assigned to her.

Mr. Watts rose to argue the case further on the part of the plaintiffs; but was stopped by the court, who expressed their wish to hear what could be further urged on the part of the defendant.

Mr. Duncan, in support of the appeal, enlarged on the topics which had been insisted upon before by his colleague: and particularly, on the circumstance of the widow having neglected to petition the Orphans' Court for an order empowering her to sell the lands of the intestate for payment of his debts. To her laches in this particular, he

* In *White v. White*, 9 Ves. jr. 555, it was decreed by Lord Chancellor Eldon, that though the old rule, throwing one-third of the fine upon renewal on the tenant for life, does not now prevail, the tenant for life must in general cases, contribute beyond the interest, in proportion to the benefit he takes.

imputed all her difficulties, as she could not be endowed until the debts were paid. He doubted, whether a widow could support an action of dower at common law, inasmuch as her claim to a portion of the lands must rest on this, that the lands might be divided without prejudice to the whole.

Under section 11, of the act of 1705, no partition of the lands of the intestate shall be made, by or for his relict or younger children, if the heir at law will pay so much money as their respective purparts will amount to. 1 Dall. St. Laws, Append. 45. And by section 4, of the act of 23d March 1764, Ib. 47, partition cannot be made, unless it appears to the Orphans' Court, that the lands may be divided without prejudice to, or spoiling of the whole.

A case may be put wherein the widow's right of dower must necessarily be suspended. Suppose a judgment obtained against the administrator, for a debt due from the intestate, and the whole of his lands delivered over to the creditor under an extent, the widow can no longer be in the receipt of the rents and profits of her purpart. The fund out of which her yearly payments would arise, being removed from the heir at law, her annual sum would cease also. And this is a case, where though she is a mere tenant for life, she would be obliged to pay her full proportion of the debt upon the land, before her right of dower could be revived.

Yeates, J. What could be done for a widow, in case all her husband's lands were extended for his debts, is not now before us. When such a case does occur, the court will deliberate fully before they act.

Before we can confirm this report of the referees, the proposition must be established, that the heir of an intestate may take the rents and profits of valuable lands, and not contribute one single cent towards the support of his widow. The defendant here has enjoyed the real estate of Henry Pawling, above 12 years, and yet has made but one single payment of 150l. to his widow. While he holds the lands for his own benefit, no ground can be assigned why the widow's annuity should remain unpaid. The debts due from the intestate are chargeable on his lands, on a deficiency of personal assets; but until the creditors have proceeded to a sale, the right of the widow to the profits of her share, stands on the same footing as the right of the heir to his share. If the heir has paid any of those debts, she comes in as a creditor *pro tanto*.

It is true, the widow's ultimate right of dower must depend on the state of her husband's lands after payment of his debts; but it is not true, that she cannot receive a temporary share until

that object is accomplished. She cannot compel the creditors to commence suits ; and without funds she cannot discharge the debts. Her not applying to the Orphan's Court in this instance for an order to sell the lands has been accounted for. But independently thereof, it does not appear that the heir has received any injury thereby, while he has had the undisturbed possession of the whole estate, and that too daily rising in value. When any part of the lands is sold by legal process, the share of the widow must proportionably decrease ; but as between her and the heir, she was entitled to one moiety of all the lands until such sale. It may be another question, which however cannot take place here, whether if upon the sale of all the lands, there should be a deficiency of assets, both the heir and widow might not eventually be responsible to creditors. So far from the widow's claim of dower being discouraged by our laws, she derives an interest from the valuation of mere woodland in a state of nature, where the same cannot be divided with propriety.

The erroneous principle upon which the referees have proceeded, will be readily perceived by considering the plaintiff's demand to the annuity of 150l. That sum was fixed on by the first award in lieu of the widow's right of dower, and is the interest arising out of a principal of 2500l. for one year. It follows of course, that the first set of referees must have valued all the lands of Pawling, at 5000l. or as productive of 300l. annually in net profits. Now if those lands are resorted to, by a creditor for the payment of a debt of 2000l. due from the intestate, or if any one on behalf of the heir at law, should pay that sum and look to the lands for remuneration, the consequence as to the widow must be, that the principal out of which her annuity would thereafter accrue, would be decreased from 2500l. to 1500l., and her annuity would in future be 90l. and not 150l. This reduces the matter to a mathematical certainty ; but by the account of the referees, which accompanied their report, they assume the principle that in the case already put, the widow would be chargeable with the payment of 1000l. viz. the one full half of the whole debt, which is most palpably unjust. I have therefore no hesitation in saying, that the report was set aside on the most just grounds.

Smith J. concurred.

Brackenridge, J. I had conceived during the argument, that the widow was highly blameable in not petitioning the Orphan's Court for an order to sell the intestate's lands. I do not know enough of the case, to enable me to form a decisive opinion on it.

Judgment of the Circuit Court affirmed.

SEPTEMBER TERM 1808.

SUPREME COURT HELD AT PITTSBURGH.

FOR THE WESTERN DISTRICT.

CORAM—TILGHMAN CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

HOLMES and HARRIOT plaintiffs in error *against* ABRAHAM KEITLINGER and PHILLIP SERBER.

A paper superscribed by one of the parties, respecting the matter in controversy, should go to the jury. The court cannot say what influence it might have on their minds.

WRIT of error to the Common Pleas of Crawford county.

A bill of exceptions was sealed on the trial, on the 28th March 1807, the substance whereof was as follows :

The defendants offered in evidence, that they had carried for the plaintiffs from Pittsburgh to Waterford, 16 barrels of whiskey, at \$3 per barrel. The plaintiffs alleged, that the defendants had used a part of the said whiskey on the road, and offered in evidence a letter to John Vincent, signed with the name of Abraham Keitlinger one of the defendants, and his proper mark fixed thereto, respecting the said whiskey, the reading whereof was objected to by the defendants, and not permitted by the court to be read in evidence ; because the body of the letter was in the hand-writing of Francis B. Holmes, one of the plaintiffs, and there was no witness to the said letter, and no evidence was offered to prove that the said letter was read to the said Abraham, or that he understood the contents thereof.

To this opinion the plaintiffs counsel excepted.

It further appeared by the bill of exceptions, that the said letter if read, would have shown, that the said John Vincent, was requested by the said Abraham to examine the said 16 barrels of whiskey ; and that the same John, was sworn as a witness in the cause, and testified, that the above letter was put into his hands, and that he did examine the said 16 barrels of whiskey, and found them deficient in the proper number of gallons ; and no evidence was offered by the defendants, to prove that any fraud or imposition whatever was used by the said plaintiffs or others upon the said Abraham, touching the said letter. The jury upon the evidence before them, found for the defendants, and certified in their favor the sum of \$98 and 22 cents.

Mr. Baldwin, for the plaintiffs. Can it be seriously asserted, that a paper respecting the matter in controversy, admitted to be subscribed by one of the defendants, should not have gone to the jury, to be judged of by them? Could the court determine that it would have no influence on their minds, or refuse it in evidence as immaterial? It is of no moment who wrote the body of the letter; and no proof, either positive or presumptive was given, to show that the signer of the letter was imposed upon, and subscribed his mark under a deception.

Mr. A. W. Foster, for the defendants. Every plaintiff must make out his case by legal proof. The defendants allege, that Keitlinger being unlettered, was deceived by the contents of the paper to which he set his mark. There was no presumption, that he was made acquainted with what he signed.

But how is this letter material evidence? Whether Vincent examined the whiskey, with or without instructions from Keitlinger, is of no avail, and could have no effect in the cause. It appears by the bill of exceptions, that he was sworn as a witness, and proved his examination of the contents of the barrels; so that in truth, the purport of the letter was really disclosed to the jury.

The court said, they had no doubt whatever of the matter before them. The signature of Keitlinger to the letter, was admitted to be genuine; and the legal presumption was that he knew the contents of the paper he had subscribed, but liable to be combated either by positive or presumptive proof, that he was deceived therein. So it is on the plea of *non est factum*, to a specialty. The execution of it is proved in the first instance; and then fraud or any suspicious circumstances may be shown in evidence to avoid it. But if nothing of this kind is proved, the plaintiff maintains his issue.

It is impossible for this court to denominate the letter to be immaterial evidence. It might be used by way of corroboration to the testimony of Vincent; and possibly the jury might think, that upon the receipt of such a letter, he could use more caution in inspecting the barrels of liquor. It is not for us to say, what weight this letter would have in the minds of the jury.

Judgment reserved. Restitution of the money levied, and *venire facias de novo* awarded.

Lessee of THOMAS M'LAUGHLIN *against* JOHN MAYBURY, jun.

The party applying for a new trial, must have merits and the opinion of the judge, who tried the cause, will always have great weight. One cannot be an actual settler on two tracts of land, but his children if of sufficient age to reside on and cultivate the land, may be settlers.

Indulgence will be given to a settler, who quits his residence for a temporary purpose with intention of returning to it. The title of the settler does not depend on the extent of his improvements, but on the *animo residendi*, and the possession continued.

APPEAL from the decision of the Circuit Court of Mercer county.

The plaintiff claimed as an actual settler, under the act of 3d April 1792, 400 acres west of the river Allegheny. The cause was first tried before Yeates, Justice, on the 2d October 1806, when a verdict having passed for the plaintiff, a new trial was awarded. A second trial was had before Tilghman, Chief Justice, on the 1st October 1807, when the jury found for the defendant, and a motion for a new trial was overruled; whereupon this appeal was brought.

The chief justice reported the evidence produced on the trial to the following effect.

David M'Nary came upon the lands in question, in the summer of 1796, and erected a cabin thereon. In the fall of that year, he resided in the cabin, made rails, and sowed $\frac{1}{2}$ acre with rye. In the spring of 1797 he carried out provisions to make a permanent residence, had his axe, plough, farming and household utensils about him, lived in the cabin, cleared 8 acres of which 3 acres were planted with corn, and in the fall of that year he sowed more grain, and was seen living in his cabin, which contained his bedding and cooking utensils. In 1798, he rolled logs, continued his improvements, eat and slept in his cabin, planted corn, reaped his fall grain and put in a new crop. On the 5th February 1799, M'Nary leased his land to John Maybury, senr. together with the grain in the ground, and the turnips and potatoes in the cabin for 3 years; upon conditions of his clearing more land, keeping up the possession, and sowing down 15 acres the third year, for which the landlord was to receive $\frac{1}{3}$ part. In the same month the defendant being about 18 years old, came out before his father, and resided on the land, in the cabin; he added to the clearing, made more rails, and raising spring and fall grain every year, during the continuance of the lease. He, his brother Robert, or aunt Sarah, generally slept in the cabin until November 1801.

Old John Maybury having taken a lease of an adjoining tract, removed the bed from the old cabin and converted it into a cooper's shop where he sometimes worked. About this period, the defendant courted a young woman in the neighborhood, with whom he intermarried on the 2d February 1802, and shortly after removed with his wife into the cabin on the land. During the interval of courtship

he continued to work on the land, generally sleeping at his father's, and occasionally at other places.

On the 7th February 1802, the lessor of the plaintiff erected a cabin on the lands in dispute 30 perches distant from the old one wherein there was bacon hanging, but no bedding or bed, or cooking utensils. On the 10th of the same month, he obtained a survey of 400 acres which included the defendant's cabins and 9 or 10 acres of his cleared land. The new cabin being discovered not to be within the lines of the survey, was removed within the lines. McLaughlin had his bed and bed-clothes, and other title necessities about him, with some corn and meal. He deadened $\frac{1}{2}$ acre of land, made one tree into rails, and worked at jobs in the neighborhood ; but on Saturday nights, returned to his cabin and slept therein to keep up his residence. He brought his ejectment against the defendant on the 20th May 1792.

The chief justice expressed his entire satisfaction with the verdict.

Messrs. S. B. and A. W. Foster, now argued in support of the appeal.

If the lessor of the plaintiff has proved a legal settlement, he is entitled to recover unless a better adverse right has been shown. It is of no moment, what was the quantity or extent of the defendants' improvements, if unaccompanied by personal residence. Such residence is the *sine qua non* of a settlement. 4 Dall. 366. The act of 30th December 1786, defines what shall be deemed a settlement, and is explanatory of the act of 3d April 1792. Of the unequivocal intention of McLaughlin to make an immediate settlement, there can be no doubt. All his acts show it. What his motives were for fixing on this land as his place of residence, or how far his improvements had progressed, when he commenced this suit, are foreign to the question of right, if the defendant has forfeited his pretensions thereto. The hardship of a particular case cannot alter the law ; it is well known, that many valuable improvements of the possessors have been swept away by verdicts, sanctioned by the judgments of courts. This court can take notice of no other equity, than such as is sanctioned by the law.

The defendant was a minor, and came upon the land under the lease made to his father. He worked it under his immediate direction. His residence on the land in 1800 and 1801 was deceptive of the law. He often resided and eat at his father's in those years ; but from November 1801, until February following, there was not the slightest personal residence on the land. The cabin, instead of being the habitation of man,

was changed into a cooper's shop, and the bed removed therefrom. It afterwards became a smokehouse. Possession and claim are distinct things ; the former must be accompanied by extrinsic acts ; but in the present instance, what would not be deemed the commencement of a settlement is urged as the completion of one. An uniform series of decisions have ascertained the necessity of keeping up a continued residence ; if these are broke through, we shall be altogether at sea. The absence of actual settlers from their farms should be rigidly accounted for ; mere convenience will not justify the relinquishing of thir personal residence ; and it is obvious, that such persons in 1801 and 1802 cannot reasonably expect the same indulgence, as those who settled immediately after the Indian hostilities had ceased. It is submitted, that the present verdict is against law and the weight of evidence.

Messrs. Semple and Baldwin for the defendant. It is admitted, that this court will do what the Circuit Court ought to have done ; but it cannot be denied on the other hand, that the claim of the lessor of the plaintiff is a harsh one, and not to be favored, as it tends to despoil the landlord and his tenant of the fruits of their honest labors. The present appeal is made to the discretion of this court ; and on motions for new trials, mere technical rules of law will not be the criteria by which they will judge. The party applying must have merits to entitle him to a re-hearing.

It appears by the report of the evidence, that Mr. McNary having built his cabin in the summer of 1796, came to reside therein that fall, and continued such residence, as far as the circumstances of the country would permit, up to February, 1799, when he leased to old Maybury. During this interval, he cleared land and put in regular crops. The defendant under his father succeeded to him, and either he, his brother, or aunt, slept in the cabin until November 1801. During this time also he made additional improvements, and regularly put in his spring and fall crops, having more than 10 acres of land cleared and under fence ; so that here was a complete settlement and residence for five years. It is true, that the defendant, a young and unmarried man, might occasionally have slept at his father's or some neighbor's during the period of two years and nine months ; and that being attached to a young woman, he pursued his matrimonial scheme between two and three months afterwards, until his endeavors were crowned with success. He then returned to his cabin with his wife, which, while not occupied by him as a sleeping place, was made use of by his father for other pur-

poses. Who is there so rigid as not to make allowances to youth under such circumstances ?

The plaintiff's counsel have laboured hard to keep the improvements of their client out of view. Slight indeed must they be deemed, when set in opposition to five years unremitted toil. At this moment it cannot be ascertained, that the verdict of the jury was not founded on a defect of settlement by the lessor of the plaintiff, without even judging of the defendant's title. But whatever considerations may have influenced the minds of the jurors, their verdict was just and honest, and must give pleasure to every feeling heart. It has met the full approbation of the chief justice who tried the cause ; and unless it shall appear clearly to this court to violate settled rules of property, or flatly be repugnant to evidence, we trust it will now be disturbed.

Yeates, J. stated the case, and the general outlines of the evidence, as detailed by the chief justice. He then added :

I do not descend to a more minute detail of the evidence, as the title of the actual settler does not depend on the extent of his improvements, but on his improvement *animo resendi*, and continued from time to time under existing circumstances.

It has been pronounced from this bench during the present term, that this court on an appeal, are bound to do what the judge ought to have done in the Circuit Court. And if such a case has been made as requires the exercise of the controlling powers of this court by settled law, we are as much compelled to discharge our duty in this particular, as in any other of the branches of our official duties. It is an application to the sound legal discretion of the court, bottomed on the immutable principles of justice. To succeed in a motion for a new trial, the party applying must have merits.

It is a dispute between two persons claiming as actual settlers, under the act of 3d April 1792, without warrants. The jury were told by the chief justice on the trial, that the question between the parties turned on a single point, whether the actual settlement of the defendant was kept up till that part of 1801, which would make five years from the commencement of the improvement. An unmarried man in particular is not obliged to remain always on his land : he may make visits to other places ; and especially, if his father lives near him, he would naturally spend a good deal of his time with him, without being supposed to abandon his settlement. A man cannot be an actual settler on two tracts of land ; but if he has children of sufficient age to reside on and cultivate the lands, those children might obtain a tract of land by settlement ; and where a settlement has been fairly commenced, and valuable improvements made, great

allowances should be made in point of residence, unless it appears, that it was done with a fraudulent intention of effecting two residences, in order to hold two tracts. To the truth of these remarks every honest man will subscribe. I deplore the unfortunate error which has prevailed among actual settlers, that where one of them has left his habitation for temporary purposes, though he has given the most unequivocal proof of his intention to return speedily, another may invade his cabin and hold the land in opposition to him. Such conduct cannot be justified by religion, morality, or the act of 3d April 1792. The legislature never intended that an actual settler should be confined to the lines of his survey, as within the four walls of a prison. Their views as to them were much more beneficial.

This case was submitted fairly to the jury, that if they should be clearly of opinion, that the residence had been relinquished, the plaintiff's title was good. But if they had any doubts on that point, they ought to find for the defendant; because it was a very hard attempt on the part of the plaintiff to reap the fruits of another's labours.

The jury by their verdict have negatived the abandonment of the residence. They were the exclusive judges of the credit of the witnesses. Few persons will say, that the defendant's marriage in February 1802, was not a tolerable excuse for quitting his old cabin. The judge, who tried the cause, has declared his satisfaction with the verdict, and thinks it a good one. His opportunities of information of the witnesses, are much superior to those who were not present at it, and his opinion of the evidence will always have great weight in this court. On the fullest consideration, I cannot say that the verdict which has been given, is either against law or the weight of the evidence and therefore I am of opinion, that the judgment of the Circuit Court should be affirmed.

Smith, J. concurred. He had perused the opinion which had been delivered, and fully approved of it.

Brackenridge, J. I have been led to consider a little the origin and nature of granting new trials. It succeeded the writ of attain. This writ was grounded on an allegation of perjury;* and this

* Stat. Westm. 1. 3 Ed. 1, c. 38. An attain shall be granted in a plea of land.

For as much as certain people of this realm doubt very little to make a false oath, which they ought not to do, whereby much people are disinherited and lose their right, it is provided, that the king of his office, shall from henceforth grant attainments upon inquests in plea of land, or of freehold, or of any thing touching freehold when it shall seem to him necessary.

This statute is in affirmance of the common law. 2 Inst. 285. But though an attain

allegation was founded on express proof, or on a presumption of corruption in the jury by the party. Hence at common law, where the writ must be against the whole jury, the defendants could not have been fewer than thirteen. This appears from the recital in the stat. 15 Hen. 6.

The presumption of corruption in the jury by the party, where it was matter of presumption, and not of express proof, must have been drawn from the glaring injustice of the verdict. That it must have been a case of manifest wrong, will appear from the greatness of the punishment on conviction. This wrong could more easily appear, when the matter in issue to the jury, was simple, as at an early period it was in all cases. As questions became more complicated, the wrong could not always so manifestly appear; and hence the presumption of corruption did not so necessarily arise. The punishment of course became disproportioned to the evidence; conviction did not follow, and the attaint ceased to be a remedy. It was attempted to be helped out by statute reducing the punishment; yet reciting in all cases, the reason and ground of the writ, to be that of corruption by the party, and perjury in the

did lie upon a false verdict before this, yet because in plea real, the remedy is of a higher nature, the king sometimes refused to grant it.

Brief of conviction old name for writ of attaint. Stat. of Marl. c. 14.

The witnesser named in the deed, should be joined with the inquest. But if they or any of their own head will say, that it is disseisin, their verdict shall be admitted at their own peril.

13 Ed. 1, c. 80. That the justices assigned to take assises, shall not compel the jurors to say precisely, whether it be disseisin or not; so that they do show the truth of the deed and require aid of the justices.

By stat. 14 Ed. 2. Distress is given in case of default of jury of attaint to bring them,

1 Ed. 3, c. 6. It is provided, that for the great mischiefs, damage and destruction that hath happened to divers persons, by the false oaths of jurors, in writ of trespass, from henceforth writ of attaint shall be granted, as well upon the principle as upon the damages; and the chancellor shall grant without speaking to the king.

34 Ed. 3, c. 7. Here it is awarded against the falsehood of jurors, to the poor without fine.

9 Rich. 2, c. 3. Attaint given under a false oath, and also writ of error on the judgment.

11 Hen. 6. Complaint of the great damage and disherison, that cometh by the usual perjuries of jurors, the which perjury doth abound and increase more than it was wont, for the great gifts that such jurors take of the parties, &c. costs and damages given on conviction.

15 Hen. 6. Great perjury which horribly continueth, &c.

11 Hen. 7, c. 21. Whereas perjury is much and customary used among such persons as pass upon issues, &c.

23 Hen. 8, c. 3. Attaint granted against the petit jury, giving an untrue verdict, and each to be fined 20l. one half to the king, and the other half to the party who sueth; and fine and ransom at the discretion of the justices, afore whom the false sacrament shall be made.

jurors. But the questions submitted to a jury becoming every day still more complicated in evidence, and intricate in law, from the removal of restraints in the alienation of real estate, or from the relations and transactions of a more improved state of society, the unreasonableness continued more and more to be felt, of considering that as a crime, which might be no more than a mistake. The writ of attain, with all the softening of statutes in the penal consequences of conviction, ceased to be a remedy ; for no conviction would follow. The feelings of the heart and the reason of mankind revolted against it. It is now a mere name ; and the inference of perjury has ceased to be drawn even in a case of glaring injustice ; because defect of intellect or of attention in the course of a long examination, or preconceived and imperceptible bias may be sufficient to account for it : and I take notice of this early mode of questioning the verdict of the jury, only with a view to show, that originally it could not be questioned upon slight grounds.

In place of the writ of attain, which was now disused, recourse would seem to have been had in extreme cases, to the Court of Chancery ; where under a consideration of the circumstances of the case, new trials were directed.

This led to the courts of law themselves, entertaining motions for new trials. Motions of this nature had always been entertained on the ground of misbehavior of the jurors or parties, or irregularity in the finding, or delivery of the verdict ; and the reason why we do not hear more of these motions, at an early period, is, because “ the old report books do not give any accounts of the determinations, made by the court upon motion. ” 1 Burr. 394.

In Slade’s case, Style 138, which is our first case on the subject of granting new trials, it was moved, that judgment be stayed upon a certificate of the judge, that the verdict had passed against his opinion, and that there might be a new trial ; for that it had been done theretofore in like cases. But Rolle, C. J. of B. R. said, “ that it ought not to be stayed, though it had been done in the Common Pleas ; for that it was too arbitrary for them to do it. ”

Nevertheless, (though at first with great strictness) the practice of Common Pleas would seem to have prevailed : and of late years, says Lord Mansfield (1 Burr. 395) the courts of law have gone more liberally into the granting new trials ; and not only after trials at Nisi Prius, but also after trials at bar, as readily as after trials at Nisi Prius ; or indeed rather more so, as the latter must be done upon what could have actually and personally appeared to a single judge only ; whereas the former is grounded upon what must have manifestly and fully appeared to the whole court. As a reason for granting new trials, he further ob-

serves, that as most general verdicts include legal consequences, as well as propositions of fact, in drawing these consequences, the jury may mistake, and infer directly contrary to law.

This was the beginning of his doctrine, which led to the making propositions of fact in some cases legal consequences; and finally, to the exclusion of the jury in some instances, from the province of drawing legal consequences at all. I impute it to his introduction, that in subsequent practice, more liberty hath been taken with verdicts of juries, than it would seem to me, principle would warrant. It became fashionable to allege, and indeed tracts (as *Eunomus*, &c.,) have been written to prove, that the juries were in no case judges of the law; that if they did determine the law, it was because on a general issue, it was incidental to the finding the fact, and involved with it, that the courts had not only discretionary power, but were bound to control the juries in their verdicts; that if the juries were to give an hundred verdicts against what the judges took to be law, new trials should be granted; for juries ought not to be considered as having a concurrent right to judge of law, but as directed by the court; and that the direction of the court was the only evidence they could have of law, the only *speculum* through which they could look at it.

On this I observe, that in every general verdict two things must be involved; the fact and the conclusion from the fact; hence it cannot but be that the jury are judges of the law. Whence then the maxim *ad questionem juris* &c.?* The maxim means, that where the

* That *decanatum* in our books, (as my Lord Vaughan calls it) *ad questionem facti*, &c., &c., is true. For if it be demanded, what is the fact? The judge cannot answer it. If it be asked, what the law is in that case? The jury cannot answer it. Rut upon the general issue, if the jury be asked the question, guilty or not which includes the law; they resolve, both law and fact in answering guilty or not guilty. So as, though they answer not singly to the question, what is the law, yet they determine the law in all matters where issue is joined and tried, but where the verdict is special. But in such cases, the judge of himself cannot answer or determine on the particular of the fact, but must leave it to the jury, with whom let it rest and continue forever, as the best kind of trial in the world for finding out the truth, and the greatest safety of the just prerogatives of the crown, and the just liberties of the subject; and he who desires more for either of them, is an enemy to both. If the court might charge the jury to find for the defendant, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them. *Per Iredell J. 8 Dall. 33.*

It is the peculiar and exclusive province of the jury to infer facts from the evidence. *Per Cushing, J. Ib.*

On questions of fact, it is the province of the jury; on questions of law, it is the province of the court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, the jury have nevertheless a right to take upon themselves to judge upon both and to determine the law as well as

conclusion can be separated from the fact, it shall be drawn by the court. This can be done only by the pleadings, in the course of which the facts are admitted, and the conclusion alone remains to be drawn.

In drawing the conclusion, the mind thinks of some general principle under which the fact may come ; and in this operation of the mind, the court must necessarily travel into the fact, from which the conclusion is drawn. They cannot, but in the first instance, make an inference from the evidence, of what the fact in the case is. It does not follow therefore, that is only matter of law of which the courts judge in granting a new trial. In every case on a general verdict, they must judge of the fact first.* Hence the imperfection of their judgment in judging of the justice of their verdict ; and it follows, that they are not bound and cannot be justified in granting new trials, against the sense of successive verdicts.

Where a mind has the faculty of reasoning, and that faculty is strengthened by the exercise of reasoning, as is presumed to be the case with a judge, great power is acquired in separating and comparing ideas ; and where a knowledge of general rules enable to determine under what rule the facts of a case come, we approach the nearer to something like certainty ; yet such is the diversity of transactions, that the application of a general rule in all cases would work injustice.† How then can a judge know or undertake to say with certainty, that when a jury departs from what he could call a general rule, there is not something in the nature of an exception in the case, which attaches the feelings of the heart and forces a verdict contrary to the direction

the fact in controversy. On this and on every other occasion however, we have no doubt you will pay that respect which is due to the opinion of the court ; for as on the one hand, it is presumed that juries are the best judges of fact, it is on the other hand presumed, that the court are the best judges of law ; but still both objects are lawfully within the jury's power of decision. 8 Dal. 4. Per Jay, C. J. in Supreme Court of the United States.

Can it then be the right of the court to set aside a verdict indefinitely ? It will be to say, you may determine the law, but your determining is nothing. Yet this must be the result of the doctrine of an arbitrary power in the court to set aside a verdict, on the ground of being against law.

*Also in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the manner, they may give their verdict generally, as is put in their charge ; as in the case aforesaid they may well say that the lessor did not disseise the lessee, if they will, &c. Lit. § 368.

†There is an excess of discrimination in investigating the qualities of things, which in legal as well as other objects of critical disquisition, tends only to draw out a question to infinity. That the foundation of every rule must of necessity, be imperfect, and that it is impossible to bound the scope of its application to a mathematical point. Rob. on Frauds. Cites 2 Atky. 41, 42.

of the court who apply the general rule. For this reason, the verdict of a jury ought not lightly to be questioned, even though it has gone against the opinion of a judge.

It is with less confidence, that a court ought to advance, in granting a new trial, on the ground of a verdict being against evidence. And one reason for this (which can never be answered) is, that the judge cannot fully know upon what evidence, for they may have other evidence than what is shown in court, Tri. Per. Pais. 274. The impressions of a jury of what they themselves know of the parties or witnesses, or what is collected from the manner in which the testimony is given, cannot be communicated, and makes no part of the evidence before the judge. To say therefore, in the language of Judge Foster, (1 Burr. 395,) "that the evidence greatly preponderates against the verdict," is a matter, which in no common case can be done. I am therefore not disposed to think that in every case, § "where there is a reasonable doubt," (which is the expression of Lord Mansfield) we are justifiable in setting aside a verdict.

The granting a new trial must involve the idea, that the court so exercising the power, have the evidence all before them, from which the fact was inferred by the jury. Unless therefore in the case of a judge before whom the evidence was given, there cannot be the same evidence that was given to the jury. For though the whole be taken down by the notes of the judge, *literatim* as to written evidence, and *verbatim* as to oral testimony, yet the impression cannot be communicated. For as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. 3 Black. 375.

The law's delay is proverbial; it is enumerated by the poet amongst the evils of life. It furnishes an argument against turning the successful party round to another trial. Nor is it him that it delays only, but other suitors. There is greater delay in this state from granting new trials, than under the judiciary system of that country from whence we derive the practice. There the four terms occur every year, to which the motion for a new trial can be made; and the cause may go to trial at the sittings after term, or at a *Nisi Prius* court, allowing only reasonable time for the commission to issue and the jury to be summoned, and the new verdict may be had in three months. Here, so far as respects the *Nisi Prius*, the delay of a new trial ordered at March term, must be until December, and in all the Circuit Courts it cannot be less than a year; so that the delay of judgment and execution, independent of the merits, is of itself an objection for a motion for a new trial. Hence it is, that in the Circuit Courts, the motion for a new trial, where the verdict is for the plaintiff, is a thing of

course, an appeal being given from the judge refusing a new trial, and the delay of course obtained. It being thus a thing contemplated by the judge before whom the cause comes to be tried, that a motion for a new trial will be made, he is led to delay the trial by taking down the written evidence at great length, and “to chronicle the small beer” of the testimony, endeavouring to reach the whole body of the evidence, so that the time allotted for the circuit is sometimes taken up with little more than a single cause; and when a new trial is granted, the judge who comes the next year has the same cause to occupy his chirography, and prepare for the motion that is to be made again. This may be said to be in some degree the fault of the system but the court must take the system as it is, and in matters of practice must look to it; and the reason *ab inconvenienti* must weigh with them in all that is within the province of discretion. Our legal discretion must have respect to the rights of other parties, who are waiting on the country for the hearing of their claims. And at a time when the cry of delay is loud against administration of justice, it would seem to me, that it is our duty to consult dispatch in the trials, and to refuse, unless in extreme cases, the throwing the matter back upon another jury. The public sentiment, as far as I can collect it, is with the juries; and we hear less of the injustice of verdicts than of the delay of trials. If a more sparing interference of the court’s should not be exercised, it may come to be felt by the people, and lead to a reform in a system which does not give time for those revisions of verdicts which the constitution and holding of the English courts admits. Is it a time for the courts of this country to be stretching to the utmost extent the control of verdicts, when the struggle is, whether there shall be law judges at all? Rules of law are to be regarded as much as the principles of any other science; but a great part of these rules which we call law are but the dictates of natural feeling, or moral reason applied to the case before us; principles of equity and justice, resulting from the relations or contracts of men. Judge, in the plenitude of his pride, is apt to arrogate to himself, as having alone the capacity to judge of these, or to apply them, which is but the exercise of reason. A consideration of these particulars ought to give respect for the deductions of even uneducated men, so as not lightly to set aside what they have thought the justice of the case.

A knowledge of rules is the result of reading or of hearing but the application of them requires a different faculty, and which we denominate common sense. Now it is allowed on all hands, that a man may have at least the reputation of a great judge, and yet be deficient in the knowledge of human nature and in natural under-

standing. It is the province of a court to assist with the knowledge of rules, and of a jury to assist in the application of them. This gives a jury a wider field than the mere finding of a fact, even supposing them excluded from determining what the law is. The sense of a jury in the application of law to the fact is a great help to the court, and a great support. *Consilium simul atque auctoritas adsunt.* Tacit. de Mor. Germ.* A passage, which expresses the use, and perhaps the origin of juries.

I never find the verdict in agreement with my way of thinking as to the justice of the case, but I draw from it strong confirmation of my opinion; nor ever find it against it, but I go a great way in taking it for granted that I was wrong. And with good reason; for it has been rare, that I have not observed in the jury all due deference to the judgment of the court; and it must be a strong sense of right and wrong that will lead them to dissent. It is this experience, and this course of thought, that has given me some resistance to application for new trials.

It has been perhaps increased by the time taken up in arguing them, and the making them in the Circuit Court mere matters of course; so that every cause must be tried with a view to a new trial; and the judge is more concerned to get the evidence forward to the hearing in term, than to infer from it in the first instance.

So much with respect to the province of the jury in determining the law, and the province of the court in controlling their conclusions in matter of law by setting aside a verdict. But in matter of fact, the conclusion of a jury is still more to be respected. I will not say, that it is exclusively their province, but it is peculiarly their province, and and not lightly to be invaded. It must be a strong case, such as to shock the mind, that would make me easy in throwing the parties upon the country for a new trial, where there has been no surprise, a full hearing, the advantage of learned advocates, &c. but where the motion is made merely on the ground that the verdict is against evidence. But where the judge who had tried the cause, and before whom the verdict was taken, has sanctioned it with his judgment, and now declares himself satisfied with it, as at present advised, I am nearly prepared to say, that to interfere, is a power which I will not undertake to exercise. At least, I am prepared to express a wish, that the legislature will interfere and take away the appeal in such cases from the Circuit Court altogether, to prevent delay that must be done, or the system must be changed.

* Eliguntur in iisdem consiliis, et principes qui jura per pagos vicesque reddunt. *Consilium simul atque auctoritas adsunt.*

Having made these summary observations, I shall now consider in a few words, the case before the court. It may be said to involve a question of law, for that an actual settlement is necessary to support the claim of the plaintiff, or to protect the defendant, is matter of law ; and it may be, that what shall be construed an actual settlement, may be considered as matter of law. But this consideration, in the nature of the thing, is so involved with the conclusion to be drawn from the facts, that it amounts to the same thing : for the question will be, whether the facts of the case constitute an actual settlement. The legal conclusions, and the conclusions from the evidence cannot be separated. The verdict can therefore be considered only on the ground of being against evidence. Here then was the conclusion of a jury, and the sanction of the judge before whom the cause was tried ; and what weighs still more with me, that judge after reflection, and a lapse of time, declaring himself satisfied with the verdict. I shall therefore not be disposed to disturb it ; but to concur in refusing a new trial.

Judgment of the Circuit Court affirmed.

JOHN GAILEY, plaintiff in error *against* THOMAS BEARD.

If damages under 40s. be recovered in slander, and judgment entered for costs ; on error brought by the defendant below, the judgment will be reversed *in toto*, and restitution and *venire facias de novo* awarded.

WRIT of error to the Court of Common Pleas of Crawford county.

It appeared by the record, that the suit was in slander, charging words of perjury. It was tried at Meadville, on the 16th October 1802, when the jury gave a verdict for the plaintiff below, and assessed damages at five dollars, with six cents costs. Judgment was entered thereon, and a *ca. sa.* issued to January term 1803, for the damages, together with \$91 38 cents costs. The money was levied thereon ; and on the return of the writ, a rule was obtained by the defendant below, to show cause, why the costs received beyond the damages should not be returned. This rule was afterwards discharged on argument, in June term 1804.

Mr. A. W. Foster, argued for the plaintiff in error, at the last term.

Where damages in slander are found under 40s. the plaintiff shall not recover more costs than damages. 1 St. Laws 95. Where consequential damages are the gist of the action, there the cause of action is out of the statute. Aliter, where the words are actionable of themselves. 1 Bac. 564. 2 Espin. Dig. 268-9. Bull. 11.

2 Stra. 936. Where words are actionable in themselves, special damages cannot be recovered, unless laid in the declaration. Bull. 7, 21. The defendant in error is therefore entitled to a restitution of the money which has been received under an illegal execution. 2 Sell. 515, (387) 2 Cro. 698. 4 Mod. 161. This court will reverse the judgment below, so far as it respects the costs, but will affirm it, so far as it respects the damages. There can be no reason for a new trial, when the controversy is fully settled by the verdict, against which there is no exception. The damages and costs are distinct things, and capable of separation. If a judgment below be for the plaintiff, and error is brought, and that judgment reversed, yet if the record will warrant it, the court ought to give a new judgment for the plaintiff. 2 Sell. 513, (386.) Cites Cro. Car. 443. Salk. 401. Hob. 194. A judgment may be reversed in part, and affirmed in part, where part is by the common law, and part by statute. Salk. 24.

Messrs. Semple and Baldwin, for the defendant, admitted, that the judgment of the Court of Common Pleas could not be supported, and that a writ of restitution should issue. But they insisted that the judgment being entire below, it must either be reversed or affirmed *in toto*.

A marked distinction is to be found in the books. Where the plaintiff below brings error, and the court reverse the judgment, the court may give such judgment as the court below should have given. But if error be brought by the defendant below, the court can only reverse it. 4 Burr. 2156. Stra. 617. Salk. 262, 401, 433. An entire judgment for several damages on several counts, one whereof was erroneous, shall be reversed for the whole. 2 Ld. Ray. 825. 7 Mod. 155.

But the case of Lampen v. Hatch, 2 Stra. 934, is expressly in point. There in an action for words, the jury of inquiry gave 10l. damages, and the costs were taxed at 18l. and judgment had thereon. On error brought, the counsel for the plaintiff below insisted, that the judgment should be reversed *in toto*, it being a joint judgment, and not like the cases where no costs can be given, and there is a distinct judgment. And the court without any difficulty reversed the judgment *in toto*.

Our act of assembly pursues the very terms of the stat. 21. Jac. 1. c. 16. § 6, as to this point.

The court being desirous of examining, whether any case of this kind had occurred in Philadelphia, continued the matter under advisement.

And now per Tilghman C. J. The case of Lampen v. Hatch cited by the counsel of the defendant in error is so very similar to that before the court, that I do not see how we can get over that authority. But I carefully avoid saying any thing about the general powers of the court, as to reversing a judgment in part, and affirming it in part. I am of opinion that in this case, the judgment of the court below, should be reversed *in toto*.

Yeates, J. Agreeably to my promise to my brothers, I consulted Mr. E. Burd the late prothonotary of the Supreme Court, as to the practice in cases of this nature ; but he knew of no instance of the kind. The general course is, for the Supreme Court to give judgment upon writs of error, when warranted by the record. The case in 2 Stra. 934, runs on all-fours with the present ; and yet it seems to be shaken by Cuming v. Sebly, in 4 Burr. 2489, where in a recovery by the plaintiff below, of 1000l. debt upon the bribery act of Geo. 2 c. 24. § 7. in C. B. together with 1l. damages, besides his costs, and so much for his costs ; and the defendant below brought error, the judgment was reversed as to damages and costs, and affirmed as to the debt. And there Lord Mansfield laid down the rule thus. " Where the defendant below brings a writ of error, we only reverse such wrong part of the judgment, as he complains of." *Id.* 1490. But circumstanced as this case is, I concur, that the judgment be totally reversed, the defendant in error agreeing thereto.

Smith, J. also concurred.

Brackenridge, J. From the short note of the report of Lampen v. Hatch in Strange 984, it cannot be inferred, that we have a full view of the reasons which governed the decisions of the court, but it may be collected from the words used, that the motives with the counsel for insisting to have the judgment reversed *in toto*, was the smallness of the damages ; and the difficulty that was supposed to be in the way, was, whether it could be reversed *in toto*, there being error but in part. Here the struggle was to get at justice, and the technical difficulty to be got over, viz. whether the judgment could be reversed *in toto*, there being error but in part. To help them out in this, the counsel insisted, that it was a joint judgment. The court without difficulty reversed in this, *in toto* ; but it is not to be inferred, that they could not have considered it as a distinct judgment, and have reversed in part. It was considering it joint, to get at justice ; when if for the same purpose, they had been inclined to

consider it distinct, there would have been no idea of difficulty in the case, and the word would not have occurred. The object was to give the plaintiff an opportunity of obtaining greater damages; and I am disposed to do the same here, and for the same reason. For it is very probable, that the jury in giving small damages, had it in their consideration, that the costs of the suit were to be added to them.

Had the court said in the above case, we think ourselves justified in considering the judgment joint or distinct, as we think proper, that is as one judgment, or as a judgment for damages, and a judgment, for costs taken separately, one judgment with respect to the whole subject two judgments with respect to the parts, it would have been right; for it is as the judgment is referred to that it becomes entire or separate, and may have distinct application. Now it is probable, the court said to this effect; but the reporter took notice only of the simple difficulty, the considering a judgment for damages and costs as a joint judgment where the parts were distinct; but it never came into their heads or the counsel, to find a difficulty in considering the judgment, distinct; and to reverse in part where error was alleged in part only. It is by examining the reason of the case, and the ground of the decision, that we can supply in our own minds the defect of the report. Perhaps the court in the case in *Strange*, went no further, than simply to say, they found no difficulty in considering the judgment joint, so as to get at a reversal of the whole; but omitted observing, that they might also consider it distinct, so as to reverse in part only; and hence the idea has been taken, that they could not but have considered it as joint; and it is, lest it should be inferred, that I give countenance to the narrowness of such doctrine, that I go a little more into the subject; for I think it disreputable to the science of the law, to have it supposed, that we cannot reverse where there is error, without reversing at the same time what is right. It ought to be some impracticability in the nature of the thing, that ought to prevent it. This may be the case where the judgment is so entire, that it cannot be separated, where the whole must stand or fall. In 2 Stra. 924, there is a reference to 1 Stra. 188. *Bellow, v. Aylemer*, in a *scire facias* against an executor, execution was awarded, and then the record goes on with a *consideratum est etiam*, that the plaintiff should have costs. It was admitted, that the 8 and 9 Wil. 3, c. 10, which gives costs on a *scire facias*, does not extend to executors, and therefore the judgment for costs was erroneous. But then it came to be the question, whether the court should reverse the whole judgment, or only *quoad* the costs: for the executor insisted to have it reversed *in toto*, and that it was but one entire judgment, on which they could not have several executions. The counsel in re-

ply contended, that by the *consideratum est etiam*, the judgment as to costs, was a distinct and independent judgment. But *per curiam consideratum est etiam* does not disjoin it at all; yet they reversed as to costs, affirmed *pro residuo*. This must have been because it could be resolved into parts by the nature of it; and the form of entering by a *consideratum est etiam* as they suggest was of no account. 2 Stra. 808, is also cited, which is to the same effect, and does not go to the point whether the court would reverse *in toto*, but whether they must reverse *in toto*, where error was in part, and shows that this was the only question in 2 Stra. 934.

A judgment when entire, cannot regularly be reversed in part and affirmed for the residue. Tidd 1128. He refers to 2 Ld. Raym. 825. There old cases in Hobart and Moore were overruled; and because one count was bad, being on a note of hand, and laid as according to the custom of merchants, though several damages were given, the court refused to reverse in part. But in my opinion, the old books had the better reason, and Holt was as erroneous in overruling them, on the authority of the cases in Keble, which were cited, as he has been since shown to have been, in his notion, that the count was bad, according to his opinion in Clerke and Martin. There is a narrowness in it which cannot bear the examination of common sense. But the case which Tidd gives as an example to his observations, has reason with it, viz. that where A. brought an action on the case against B. for words spoken of him, and for causing him to be indicted, and the jury found a verdict for the plaintiff as to costs, with entire damages; yet it being afterwards holden that the words were not actionable, the judgment was reversed *in toto*. And with good reason; for how could it be ascertained how much of the damages had been given for the words not actionable? But he goes on to observe with the same good sense, that if part of the words laid be not actionable, and several damages are given, it seems that judgment shall be reversed in part only. I would say, that the making a difficulty of abridging the judgment or confining it to what is supportable, is like the embarrassment of the Welchman with his rope; if it had been too short, he could have spliced it, but being too long, he did not know what to do with it. The true principle is, that where the judgment consists of independent parts, and it can be ascertained what is given on one, and what on the other, the judgment as to one part can be reversed and affirmed as to the other. This principle is recognized by authorities. In a writ of error, we reverse only such a wrong part of the judgment as is complained of. 4 Burr. 2490. Where judgment is partly by common law, and partly by statute, it may be reversed in part. Salk. 514.

At the same time, I must say that though the courts have laid down this general principle, yet in the application of it, they have boggled in such a manner as to embarrass a person, who might be at a loss to see why they did consider judgments entire, that were easily separable ; as where damages and costs were incorporated, they reverse as to damages and costs, when the error was only in the damages. 4 Burr. 2022. As the costs could be ascertained on subtracting them, did not the damages appear, so that it was ascertainable what was to be reversed and what affirmed ? I am therefore more disposed in this, as in many other cases, to take the thing up as if there never had been a decision, and enquire what can be done, and what ought to be done, on the ground of general convenience, and conducing most to a speedy administration of justice. It certainly is not to be desired, if it can be avoided, that a suitor shall be turned round, to begin again, having attained the end of his suit, merely because error has intervened in some particular item, which goes to make up the sum which is to be recovered. It looks as if there was a spell upon the mind, that it could not think in such decisions.

Judgment of the Court of Common Pleas reversed *in toto*, restitution and a *venire facias de novo* awarded.

ROBERT GALBREATH, JAMES BRYSON, JAMES SAMPLE, EPHRAIM JONES
and TARLETON BATES *against* JUDAH COLT.

Agreement to argue a case before the judges of the Circuit Court and their opinion to be conclusive, if the agreement should come on before one judge of the Circuit Court by mutual consent, upon a change of the judiciary system, no appeal will lie to the Supreme Court, from the decision of such single judge.

APPEAL from the decision of the Circuit Court of Allegheny county.
An amicable action was entered between the parties, under the following agreement.

Galbreath, et al. v. Colt.

It is agreed, that an amicable action in case between the said parties, be entered as of June term last. The defendant pleads *non assumpsit* and payment, with leave to give the special matters in evidence. The plaintiffs join issue on both pleas and rule for trial. It is further agreed, to remove the cause to the Circuit Court, as of September term last, to argue it before the present judges of said court, on a case to be stated to them, and such other evidence as either party produces, and their opinion to be conclusive, between the parties ; it being mutually understood, that the object of the present suit is to

obtain a speedy decision on the points in controversy, without any regard to the form of action, all objections on either side are waived, not relating to the merits of the case.

Henry Baldwin, *pro quer.*

James Ross, *pro def.*

To the Prothonotary of Allegheny county, 31st October 1803.

In pursuance whereof, the amicable action was entered and put at issue, and removed as of September term 1803, into the Circuit Court, and the following case was stated and signed by the parties, for the opinion of the court, viz.

At the Allegheny Court of Quarter Sessions, of September 1797, several bills of indictment for riots, were found against James Lowrey, and others. The defendant, as agent for the Pennsylvania Population Company, was the private prosecutor of these indictments; and at the said sessions, by the advice and direction of the court, he entered into a stipulation to pay costs, in case of a verdict for the defendants.

These indictments were continued from term to term, until September term 1798, when the defendants pleaded not guilty to all the indictments, and were convicted upon one of them.

After this conviction, it was agreed between the defendants, and the attorney for the commonwealth, with the consent of Judah Colt, the private prosecutor, that a *nolle prosequi* should be entered against the defendants in two of the indictments, upon the payment of costs by the defendants. This entry was accordingly made upon the docket, and indorsed upon the indictments, together with an agreement by the attorney for the commonwealth with the consent of Judah Colt, that the recognizances of the defendants in the indictments should not be sued, till after the ensuing term.

The bill of costs, when taxed by the clerk of the sessions, was disputed by the Lowreys as being too high, and was there upon referred by their consent and request, to the president of the Court of Quarter Sessions. Before the president delivered his opinion, the Lowreys refused to pay any costs, and no recognizance of theirs could be found upon which they could be sued.

Process was issued by the attorney for the state to bring in the defendants, upon three of the indictments of September 1797, and they were accordingly brought in to answer at September 1799. This process was issued by the direction of the attorney for the state, without the knowledge or consent of Judah Colt, other than his having requested that the bills for attendance of

*witnesses on the part of the prosecutor might be collected ;** and process was issued to compel Judah Colt to appear and give testimony on those indictments ; *and the prosecution was revived as the most efficacious mode of recovering the fees, and prosecutor's bill due on the indictments.** On the trial of two of the indictments at September term 1800, the defendants were acquitted and the costs taxed.

These costs are now demanded of Judah Colt, upon his stipulation of September term 1797, and he refuses to pay, conceiving himself discharged of his stipulation. The Court of Quarter Sessions have given no opinion on this question ; and the plaintiff have brought this suit, to try whether Colt is liable to pay the bills as taxed, or any part of them.

Henry Baldwin, attorney for plaintiffs.

Thomas Collins, attorney for defendant.

The case was attempted to be argued at the Circuit Court in October term 1804, but Yeates and Smith, Justices, who then held the court, thought the case not stated sufficiently full, and recommended some additions to be made thereto. This was done after the court, and the words which are in italics, were inserted in the case.

Owing to the press of business, the argument did not take place at the Circuit court, held for Allegheny county, in October 1805 ; and on the 24th February 1806, the act passed, " to alter the judiciary system of this commonwealth ;" by the 9th section whereof it was provided, that no Circuit Court of the Supreme Court should be held otherwise than by a single judge, 7 St. Laws 837.

The case was afterwards, by mutual consent argued before Tilghman, C. J., at a Circuit Court for Allegheny county, on the 15th September 1806 ; and after due consideration had thereof, he gave the the following decision thereon.

Chief Justice. It is not material to enquire whether Judah Colt, could have been compelled to enter into a stipulation to pay the costs of the indictments, in case the defendants should be acquitted. He did enter into that stipulation, which being his voluntary act, must now be considered as binding, The defendants in the indictments, having been acquitted, Colt is liable on his stipulation, unless he has been discharged by the officers of the commonwealth. He contends, that he was discharged by the agreement to enter a *nolle pro-*

* The lines in italics, are interlined in the original case.

sequi. But it appears to me, that this agreement was not absolute, but subject to the condition of payment of costs by the persons indicted. This condition not having been complied with, the *nolle prosequi* was not entered, and all parties stood precisely on the footing they were on before the agreement was made. It was the business of Colt to attend to the conducting of the prosecution. There is no reason why the county of Allegheny should be liable to the payment of costs, against which they had been guarded by Colt's stipulation, the benefit of which they never relinquished. I am therefore of opinion, that the defendant is liable to the costs of the indictments, on which Lowrey and others were acquitted.

Judgment having been entered thereon on the 7th November 1807, for the plaintiffs, an appeal was filed to this term, and six different reasons of appeal were also filed ; but as the court did not determine on the merits of the suit, it is unnecessary to repeat them.

Mr. Baldwin for the plaintiffs, now prayed that the appeal should be dismissed. The decision of the Circuit Court was agreed by the parties to be conclusive between them. The case has been fully argued, and the court have given final judgment thereon ; and the controversy between the parties is at rest.

Mr. Ross for the defendants contended, that it never had been in the contemplation of the parties, to refer their dispute to the opinion of a single judge without the benefit of appeal.

The change in the judiciary system had virtually rescinded the agreement in this particular. Under the agreement, the case was to be argued before the present judges of the Circuit Court, and their opinion to be conclusive. But it was not so argued, and therefore the decision is not within the contract of the parties.

It is well known that in October 1803, and before and afterwards, two judges usually held the Circuit Court, and no one could foresee the alteration that has since taken place : and though it may be said, that two judges in Bank might reverse the decision of two judges sitting in the Circuit Court, it will be readily admitted, that a greater difficulty would exist in such a case, than where a single judge has given his determination.

At all events, the true meaning and spirit of this agreement has not been carried into execution ; and to preclude the defendants from the benefit of an appeal, would do them a manifest wrong.

Yeates, J. The agreement of 31st October 1803, is perfectly clear and intelligible in its terms, provided it be considered as a sub-

sisting valid agreement, and referable to the cause before us. It is stipulated thereby, that the opinion of the court on the case to be stated should be conclusive between the parties.

An appeal generally lies, by the words of our Circuit Court law, from the decision of the judge in the Circuit Court on a case stated ; but the parties may, by their convention, relinquish their right to an appeal ; and cases are not wanting in our books to show, that a superior court will enforce the consent of an attorney not to bring a writ of error. If from want of time, or other imperious circumstances, a cause cannot be tried or argued according to the contemplation of the parties, when they entered an amicable action, the agreement to enter it must be considered as binding in all the subsequent stages of the suit.

It has been objected, that this agreement had in view an argument before the judges of the Circuit Court according to its then conformation ; that two members usually held it ; and that a change in the judiciary system having been introduced prior to the argument, it cannot reasonably be supposed, that the parties ever intended to be bound by the decision of a single judge without the benefit of an appeal. To this it was answered, that a case was agreed upon to be argued before the two judges, who rode in the fall of 1804, but some necessary essential facts according to their sentiments, not being stated therein, it was agreed they should be added, and the statement was corrected accordingly. It is clear, that the amicable action was entered, the declaration filed, the cause put to issue and removed, the case stated, and again corrected in pursuance of the original agreement.

If the counsel on either side thought that an alteration of the manner in which the judges rode, rendered a modification of the agreement necessary, they should have so modified it ; or if consent hereto was refused, an application should have been made to the court before the argument, showing that the true spirit of the agreement would be violated by agreeing to its terms in all its parts, by a legislative regulation, over which the dissatisfied party had no control. No one can doubt, but that full justice would have been done upon such an application. But neither of these measures have been pursued, and the parties have severally taken the chance of a decision of the question submitted in their favor. Are we now competent to vary the stipulations of the parties ? Must we not be controlled by their written declarations ? By their agreement, the cause has been removed and argued in the Circuit Court ; and each party must rest in the bed which he has carved out for himself.

At the same time I must be permitted to add, that this court would galdly have entertained the appeal, if they conceived it to be within

their power. Each member of the court feels a satisfaction in knowing that his decisions may be reviewed by the court in Bank ; but believing as I do, that we cannot proceed on this appeal without the consent of the plaintiffs to rescind a part of the argeement under which this action was brought upon our records, I am of opinion that the appeal should be dismissed.

I have cautiously avoided saying any thing on the merits of the case as filed, because I do not conceive that I am at liberty to give any opinion upon it.

Smith, J. I have seen the opinion which has been delivered, and I am impelled to concur therein, from the expressions used in the agreement, which declares that the opinion of the Circuit Court shall be conclusive between the parties. We cannot break in on that agreement, which was the foundation of the whole proceeding. My private inclination would be, to sustain the appeal, if it was possibly in our power, which does not seem to me to be the case. Though the argument did not come on at the court following the agreement, it was still binding, and such has been the constant practice. The cause was removed and argued under it ; and as the defendant might have availed himself of it, if the decision had been in his favor, so also may the plaintiffs under the event, which has taken place. But I think the case is peculiarly hard on the defendant.

Brackenridge, J. I understood the first question in this case to be, whether an appeal is suitable by this court, from the opinion of the Circuit Court, which was given on a case stated, under an agreement, of which I have not been furnished with a copy, along with that of the statement of the case ; but which I understand to have been to submit to the opinion of the two judges, then holding the Circuit Court, and that opinion to be conclusive ; provided the argument could be heard by those two judges, from the interference of other business at the time. In strictness then, I would take it, there not having been time for hearing by those two judges, from the interference of other business at the time, there was an end to the agreement, and without an accommodation of the agreement to a hearing in another manner, it was *coram non judice*, and the hearing void. Much more so, when a change in the constitution of the court gave the advantage of one judge only at a Circuit Court, instead of two ; and more especially, when a reason which might have weighed, and it is presumable did weigh in the agreement on the part of either of the parties, was, that the court being constituted but of four judges, in the case of a reference to two, there could not be a majority out of four, to reverse the opinion of two ; a rea-

son which is well known did operate much at the *Nisi Prius* courts, to prevent appeals or motions in bank, from that which we had discovered to be the sense of the one half of the court, who had already heard the matter, considering such a motion or appeal to be unavailing: so that an agreement to acquiesce in the opinion of two as conclusive, even under the constitution of the Circuit Court, was not giving up much. For though the other two judges in bank might reverse the opinion of the two circuit judges, yet the presumption was strong against it, the number being equal in both cases, and the presumption of understanding the same. There is therefore a great difference in the agreement to submit to two, under the former constitution of the Circuit Court, and a submission to one under the change which has taken place.

But it may be said, the arguing the case stated before the single judge, by implication, carries with it the agreement that the single judges, opinion shall have the effect which the agreement contemplated; which was, that of a decision by two; and if such was not the understanding of the party defendant, it behoved him to have had the agreement accommodated to his ideas, by an alteration as to that part of it, which respects the conclusiveness of the effect. On the contrary, I would take it, that it behoved the party plaintiff, to have had an alteration made as to the submission to one judge, if he meant to avail himself of the conclusiveness of the opinion of one.

It may be said, there is an *astutia* here, to defeat the plaintiffs in the advantage they have gained by the opinion of the single judge, and to relieve the defendant from the decision of which he complains. It may be so: but may it not be justifiable, if it would seem to me, as I must acknowledge it does, that the single judge has erred in his judgment in this case? And even on this preliminary question, it seems to me, that it is proper to over-reach it in the contemplation of the mind, and to inquire what has been the decision of that judge. It is allowable then, at least I have done it, to look at the case stated, even in determining the first point. For *astutia* in an endeavor to get at justice, is allowable; and to admit a liberal or rigorous construction of an agreement, with a view to that object. I have been disposed to do so, in favor of the defendant: for it would seem to me, that the defendant ought to be considered as relieved from the stipulation, as to the costs of the prosecution in question. My memory does not serve me with a positive recollection; but it seems to me, that in the course of my reading I have seen something, which has led me to doubt the power of the court to impose the stipulation; and on principle, there would seem reason to doubt it. For though in fact,

in a forcible entry there is a private as well as a public wrong, and often times the injured party resorts to the indictment, merely with a view to his private wrong, yet I should be at a loss to conceive, that the power of the court could oblige him to stipulate for costs in this more than in any other criminal case, when the statutes have not done it. If so, the stipulation would be void, and on that ground the defendant would be relieved. But supposing the stipulation legal and binding, it respected an acquittal on trial. But here by the agreement on the part of the commonwealth with the defendants, the prosecution is arrested short of a trial; a *nolle prosequi* is entered on payment of costs. It is true, the prosecutor assents to it. But nevertheless, it is the agreement of the attorney for the state with the defendants; and I would take it, that the agreement takes the case as to costs out of the stipulation, and puts it wholly on the recognizance. The prosecutor, the stipulant, directed the proceeding for costs. But what could he be supposed to mean, but that the proceeding should be on the recognizance of the defendants, and for the purpose of costs only, and not for the purpose of trial? But no recognizance had been taken, as stated in the case. This was the oversight, of the officer for the commonwealth, and for which the prosecutor, the stipulant, is not answerable. If the officer is reduced to the necessity of recurring to a process, to bring in the bodies of the defendants, and going on to trial from the default of a recognizance, it would not seem to me reasonable, that he should hold the prosecutor to his stipulation, who in consequence of the agreement of the attorney of the state with the defendants, had given up the prosecution.

It is under these impressions that I may be disposed to give the stipulant the advantage of any want of conformity to the agreement, on which the strictest construction of it, in order to let in a consideration of this point. Justice is the great object of us all; and when that does not certainly appear to have been obtained, the mind is not satisfied; more especially, if all advantage has not been had in the hearing by such tribunal, in the first or last resort, as it may have been in the contemplation of the party to have had, who thinks himself aggrieved by the determination.

It is possible, that on hearing the matter argued, I might think with the judge who has given an opinion; and in order to get at this, if the party to the agreement on the one side, will hold the other to the conclusiveness of the effect of the opinion, I would hold him to the strictness of the agreement as to the tribunal before whom it was agreed to be heard; and unless he would consent to waive the conclusiveness, and give the advantage of a hearing on

appeal, I would turn him round to o begin again on the case stated, or leave him to his action, as it was commenced, and the ordinary progress of the suit.

Appeal dismissed.

JAMES WELCH, for M'DONALD and WELCH and JOHN WELCH, plaintiffs
in error *against* JAMES VANBEBBER and William CHAMBERS.

Recognizance of bail in error, amended after judgment affirmed.

MR. BALDWIN, for the defendants in error, moved the court, to amend the recognizance of bail taken before Mr. Justice Brackenridge, by striking out of the same, the words "the commonwealth of Pennsylvania," and inserting in lieu thereof " James Vanbebbber and William Chambers," and also adding the words " and John Welch."

The recognizance has been given to the commonwealth, instead of the plaintiffs below ; and the name of John Welch, against whom the judgment had been affirmed in this court, was wholly omitted.

The motion is founded on principles of justice, as well as authority. The judge indorsed on the writ of error, that bail had been taken, which was a supersedeas to the proceedings below. His error ought not to affect the suitors. John Welch subscribed the recognizance, but his name is omitted in the body of it. He has produced the delay, but shall not be permitted to avail himself of the incorrectness of his own acts. 1 Massa. T. R. 233.

Courts of justice are now very liberal in allowing amendments for the furtherance of justice. 1 Bac. 883. Bail, (new edit.) 1 Com. Dig. 445. Amendment A. A judgment may be amended, unless injustice will be done thereby. 6 Term Rep. 1. A *scire facias* against bail in error, amended. 1 Bos. and Pull. 275. Trespass and false imprisonment against two, one only found not guilty, a writ of error in the names of both, amended. Cowp. 425. A *scire facias* on a judgment amended, before plea pleaded. 2 Ld. Raym. 1057. Bail piece amended, even after a suit by *scire facias*. 1 Barnes 4. Recognizance of bail amended. *Ib.* 59. *Scire facias* amended. 1 Dall. 132-4. The court have all the record before them, to amend the error, which has been committed by the defendant below.

Mr. Campbell made a slight opposition to the motion ; insisting only, that the application should have been made before the affirmance of the judgment.

Sed per curiam. At most it is but a clerical mistake, and here we have something certain to amend by. It is possible that the recognizance in the name of the commonwealth, might be good, under the authority of *Respublica v. Lacarze et al.*, (2 Dall. 118, Addison 59,) though certainly it is not formal.

Motion granted.

JOSEPH GARDINER, plaintiff in error *against* the lessee of FRANCIS MURRAY and MARY, his wife.

In ejectment, judgment for want of appearance must be against the casual ejector. After a *certiorari* read and allowed, there can be no further proceedings in the court below.

WRIT of error to the Common Pleas of Bedford county, returnable to September term 1807.

It appeared by the record, that the ejectment was instituted to February 1806, and returned served; whereupon a rule was entered to plead in six weeks or judgment. The defendant in the record was Gardiner, and Mr. Hamilton's name was entered in the margin, as his attorney, but his appearance was not entered at large, nor any plea or entry into the common rule.

In the same term the suit was removed by *certiorari* by the defendant into the Circuit Court. On the 20th May 1806, judgment was entered on the common pleas docket by Mr. J. Lyon, *pro quer. sec. reg.* and a writ of possession issued thereupon.

Mr. S. Riddle for the plaintiff in error insisted, that the entry of judgment in the Court of Common Pleas was wholly erroneous. If judgment could be entered for want of a plea, it ought to have been in the Circuit Court; but such strictness has not obtained amongst us.

Mr. Ross for the defendant here contended, that an attorney appearing for a defendant in ejectment was of no avail, unless he filed his plea and entered into the common rule. Under such circumstances, it was not competent to him to remove the suit, any more than a defendant could who was taken on a *capias* and had given a bail bond without entering special bail. Besides, the omission of the plea and common rule might be attended with delay in the progress of the action.

Per curiam. If this be considered as a judgment by default, it ought regularly to have been entered against the casual ejector, and not against the defendant in possession. If Mr. Hamilton

really appeared for the defendant, and the Court of Common Pleas have adopted that opinion by their certificate of the record, he might have removed the cause; and if there was any thing improper or irregular in this removal, application should have been made to the Circuit Court for a *procedendo*. After the *certiorari* was read and allowed below, no further proceedings could be had in that court until the suit was regularly remanded. The result necessarily is, that the Judgment must be reversed and restitution awarded.

WILLIAM BROWN, jun. assignee of ROBERT WILLOUGHBY *against*
JOSEPH HERRON.

Where a bond under the plea of payment is meant to be avoided for a total want of consideration, notice of the special matter must be given to the adverse party.

APPEAL from the decision of the Circuit Court of Allegheny county.

The cause was tried before Judge Smith, on the 8th October 1807, when on the plea of payment to a bond, without giving thirty days notice of the special matters intended to be objected in avoidance of the same, the defendant offered testimony of a total want of consideration, which the judge overruled, and a verdict was thereupon found for the plaintiff.

The point was submitted to the court by the counsel on both sides, whether any distinction existed as to notice, between a total and partial want of consideration under the 29th rule of practice of the Circuit Court.

Per curiam. There can be no possible ground of distinction, either within the words of the rule, or the reason of the thing itself. The object of the rule was to guard against surprise; and if it was proper that notice of the special matter should be given where part of the demand is disputed, it must be equally so where the defence goes in avoidance of the whole amount of the specialty.

Judgment affirmed.

Messrs. Ross and Wilkins, *pro quer.*

Mr. Semple *pro def.*

**ALEXANDER WRIGHT and WILLIAM PORTER, plaintiffs in error *against*
the lessee of JOHN SMALL.**

Warrants under the act of 8d April 1792, should contain a special description of the lands. A special entry in the books of the deputy surveyor cannot supply the defects thereof, nor is any one bound to take notice of such entry.

If an improvement is begun with an intent to make an immediate settlement, and prosecuted with due diligence till a settlement is completed, the title will relate to the first improvement.

If delay takes place in the settlement, it lies on the improver to account for it in a reasonable manner.

ERROR to the Court of Common Pleas of Mercer county. A bill of exceptions had been filed on the trial of the cause on the 5th May 1808, which stated with great minuteness the written as well as parol testimony adduced on both sides, together with the charge of the court.

The general features of the case were as follow': :

Small, the lessor of the plaintiff below, claimed the lands which lay N. and W. of the river Ohio, as well by actual settlement, as under three general warrants, taken out by the Pennsylvania Population Land Company, dated 14th April 1792, entered with Thomas Stokely, deputy surveyor of the district, on the 13th November 1794, and surveyed on the 6th June 1796. Small contracted with the company on the 13th November 1797, for such parts of the surveys made on the three warrants, as were included in a survey made for him in 1794 by John Kerr, under a supposed settlement.

It appeared that Small, in the fall of 1793, came upon the land, and deadened fifteen or sixteen trees, and in October 1794, built a small cabin thereon uncovered. In October 1795, he erected a new cabin, cleared about half an acre, fencing it with rails and brush, and sowed one half of it with timothy seed, continuing there two or three weeks, and declaring his intention of making an actual settlement. He returned in May 1796 and cleared an additional half acre, and inclosed the the whole with rails and brush, and planted it in corn and tobacco, and sowed turnips, which however yielded no produce. In October of the same year, he moved to the land with his family, and appeared emaciated by sickness, and continued in possession thereof until the time of the trial.

The defendant, Porter, also claimed as an actual settler, and under a warrant to Dorothy Wright, dated 16th December 1793, "for 400 acres, on the waters of Beaver creek, bounded by lands of William Porter and others," on which a survey was made on the 7th May 1803. This warrant, with five others was entered with the deputy surveyor on the 27th April 1795, when Alexander Wright, the owner of the warrants, required that the warrants should be specially entered in the books of the deputy, and desired that the warrant, in the name of Dorothy Wright, should be laid on the land surveyed as aforesaid by

John Kerr, but his request was refused, and the warrants were entered according to their several locations.

Wright, and Porter his son-in-law, erected a cabin on the land in controversy in May 1795, made between 300 and 400 rails, and deadened about one acre of ground. In March 1796, Porter came upon the land with his family, cleared and fenced four or five acres, and planted corn therein, raising during the season between 50 and 200 bushels of corn. About the 1st May 1796, Porter removed with his wife to the adjoining tract, taking thither all his household furniture except a large kettle. He planted corn that season, and during that time, he and his wife removed back to the place. Before harvest, they went to her father's house in Washington county, but he returned and worked occasionally on this land, pulled his corn and erected a new cabin. In April 1797, he returned with his wife from her father's, and lived in the cabin, which he had erected the preceding fall, (bringing with them their child about five weeks old, and she continuing in a weak state,) and progressed in cultivating the land and residing thereon. In the winter of 1798-9, he again took his wife to her father's in Washington, and worked at a distillery; she had a second child there, and they returned to the land early in the spring of 1799, and continued in possession ever since.

On the 9th April 1804, the Board of Property on a *caveat* filed by Alexander Wright against the population company, decided that Wright had the first actual settlement.

And now the counsel for the plaintiffs in error took three exceptions to the opinion of the Court of Common Pleas.

1. The first error assigned was, that the court below admitted evidence of the improvements made by Small, before any testimony was given of residence or settlement.

This was said to be contrary to the practice of the Circuit Court, and would lead to inconvenience. But it being considered as a mere question of order, and that the fact of supposed residence was afterwards testified by the witness, the point was abandoned by the counsel.

2. The second error assigned was, that the court instructed the jury, that the owner of a general warrant could not make it special by requiring of the deputy surveyor to enter it specially; that the deputy surveyor would not be authorized if required to enter it specially; and if so entered, it would not thereby be rendered special, until a survey was made thereon.

On this point, the counsel of the plaintiffs in error contended that though the 3d section of the act of 3d April 1792, requires, that the warrants for lands North and West of the river Ohio, &c. "should contain a particular description of the land applied for," yet it was

well known, from the unexplored state of the country when the office opened, and other causes, that by far the greater part of the warrants issued did not conform thereto, and had been sanctioned by courts of justice. 3 Dall. St. Laws 210. The object of the provision was, that the lands applied for being specifically described in the warrants, and so entered in the books of the surveyor of the district, should serve as a caution to actual settlers not to bestow their time and labor on lands previously appropriated, and to others not to take out warrants for such lands. If a warrant has a special designation, it will attach on those lands, and is notice to all the world; but where is the difference in principle, when the appropriation of a general warrant is fixed by an entry in the books of the deputy surveyor of the district, to which all men have access? It cannot be removed from thence, and is full and ample notice to all persons interested. The public surveyors are bound to follow the directions of warrantees, where it is evident that no injury is done to the state, or to third persons. A wrong legal principle has therefore been laid down by the presiding judge.

To this it was answered by the counsel of the defendant in error, that it was of the utmost consequence, that the provisions of the act should be adhered to. It was wholly silent, as to the owner of an indescriptive warrant rendering it special, by an entry in the books of the deputy; and in this particular, the charge of the court was perfectly correct. Besides, if it is competent even to our adversaries, to render a particular matter not contemplated by the legislature as notice in fact to actual settlers, how can it operate as notice to others, who at a great distance from the surveyor's books, pay their money to the state for new warrants.

2d. If an indescriptive warrant should be entered with the deputy surveyor, with special directions as to its execution in the same book and before it is surveyed, a subsequent warrant specially and distinctly designating the spot intended by the directions, should be put into his hands to be executed; can there be any hesitation in deciding which should be intitled to preference? A survey alone can identify the lands under a vague and general warrant.

3. The error assigned was, that the case did not go fairly to the jury, under the charge of the court. To the latter, it belongs to tell the jury what the law is, but not to usurp their jurisdiction, in determining matters of fact. Here the jury were charged by the court, that Small made the first actual settlement on the lands in question; and that it did and ought to give him a title against all the general warrants issued and entered, but not surveyed before his final settlement commenced; and that the intention of Small to settle in October

1795, was sufficiently manifested when he built his cabin, without considering what had been done in 1793. And that this actual settlement in October 1795, would relate to the improvement made with intention of settlement during the preceding fall, and was therefore preferable to the claim of the now plaintiffs in error.

A settlement is a mixed question of law and fact. It is agreed, that it must have a beginning, but it must be followed up ; it must be continued from time to time according to existing circumstances. The deadening of a dozen trees gave no preference in 1793, and the survey made for Small by Kerr in 1794, was unauthorized, because there was no settlement to justify it. An uncovered cabin during that fall may be pronounced one of the most equivocal manifestations of an intention to settle. Hundreds of such cabins are to be met with in the woods, which have never been deemed to confer a title to the lands. It is true, that in October 1795, Small built a new cabin on the land, and made some slight improvements there, and that his family came to reside in May following. But it is no less certain, that the plaintiffs in error previously thereto in May 1796, erected their cabin, made near 400 rails, and deaded an acre of ground, and in March 1796, Porter and his family removed to the land, cleared four or five acres, and planted corn therein. So that, not only the cabin, but the actual improvements and settlement of the plaintiffs in error preceded those of the defendant.

The intentions of an improver must be shown from his unequivocal acts, not from his declarations, which may be given in evidence not for him, but against him. If some certain rules are not laid down and adhered to, the titles under the act of 3d April 1793, must remain in a state of great insecurity.

The court also erred in this, that they gave it in charge to the jury, they must consider the controversy as a dispute between two actual settlers, independently of warrant rights ; which operated most injuriously to the plaintiffs in error. If the counsel of Small had not thought very differently, they would never have shown in evidence the warrants and surveys of the Population Company, their interferences with the survey made by Kerr, and the contract made with that company. But what we most chiefly complain of under this head of exception, is that instead of the courts giving their direction in point of law to the jury, and leaving the facts from which that law must arise to their decision, they determine both the law and fact themselves. Settlement or no settlement is a question of law ; but the intention of settling, and the acts of following it up with due diligence, on which it must be founded, are matters of fact proper for the consideration of the jury.

The counsel of the defendant in answer hereto, urged, that it was

evident this was a dispute between actual settlers merely, provided there had been a settlement begun on either side prior to the surveys on the in-descriptive warrants. And this was clearly the case here. But if priority of survey was to give the preference, then Small was entitled thereto ; because he deduced his claim under surveys made on the 6th June 1796, opposed to one of 7th May 1803.

It is of no moment what was the opinion of the court on questions of law upon facts not proved in evidence upon the trial.

The president may have expressed his sentiments strongly on the facts as proved to the satisfaction of the court ; and this is the daily practice both at the bar and on the bench in addressing juries : but having stated his ideas of the facts, he concluded his charge by saying, “ if the jury however think differently, and that Porter’s title is prior to Small’s they will find for the defendants.” This necessarily implies, that the intention of either party as to making an immediate actual settlement, and the continuation thereof from time to time, were facts submitted to the decision of the jury. There was no contrariety of testimony, and consequently no question occurred respecting the credibility of witnesses. The evidence on both sides was heard and considered by the court and jury. When a judge sums up the evidence, and speaks of a fact being proved, he must be presupposed to mean, if the witnesses who attest the fact are worthy of credit ; and by reasoning on facts, assuming them to be proved, he does not invade the province of the jury.

It is submitted to the court here, that admitting the evidence on both sides to be true, the prior actual settlement was clearly shown to be in Small. In the nature of things, a settlement cannot be effected at once ; it is composed of a number of progressive points. The great criterion is, that the party shall, when he commences to improve, have an intention of making an immediate settlement, as a means of supporting himself and his family. His real intent is to be collected from his expressions as well as actions. He must personally reside on the land, which must be continued from time to time, when existing circumstances will admit of it. The validity of a settlement does not depend on the extent of the clearing, or the produce raised from it, but on the *animo residendi* : and when this intent is fully ascertained, the title will be carried back by relation to the first act, however slight or slender it may be deemed standing alone. Judging by these rules, the court’s deductions from the whole evidence, that Small had the first actual settlement on the lands in dispute, where manifestly correct.

He began to improve by making a small deadening in 1793, erected a cabin in 1794, and obtained a survey by a regular officer ;

built a new cabin in 1795, clears and fences a half acre, and sows timothy seed, staying out there some weeks. At this time he is solicited to sell his claim, which he utterly refused to do, and repeatedly declares his unequivocal intention to make a permanent settlement. He returned in the spring of 1796, added to his clearing, sowed and planted. In the course of that summer he and his wife fell sick, but in the month of October 1796, he brought her out upon the land, himself in a week and emaciated state, and he has continued to reside there ever since.

Small first added his labours to the soil, and violated no man's claims. His cabin was first built, and Wright must have known of his survey from his requisition to the surveyor of the district. His possession was more continued than that of his adversaries. He neither resided on another farm, nor went into the settled country to carry on his trade.

When the claims of the contending parties are fairly contrasted, it is apprehended that there will be little difficulty in asserting, that the verdict given for the plaintiff below, was strictly agreeable to the right and justice of the case.

Tilghman, C. J. delivered the opinion of the court. This cause is brought before us, on a writ of error to the Court of Common Pleas of Mercer county. The bill of exceptions contains a long detail of evidence, after which is inserted the charge of the president to the jury; which the plaintiffs in error allege to be erroneous in several particulars.

The land in dispute, lies N. W. of the river Ohio. The defendant in error, who was the plaintiff below, claimed under a warrant, and also under a settlement right. The plaintiffs in error claimed under a warrant which contained a vague description, and was laid upon land different from that which the warrant called for. At the time of entering this warrant in the book of the deputy surveyor, a special entry was made, describing the place intended to be surveyed.

It was contended by the defendants below, that the special entry was notice to all the world, and amounted in law to an appropriation of the land 'intended to be surveyed. The president declared in his charge, that the nature of the warrant could not be altered by a special entry, and that there was no appropriation of the land before survey. This is the first alleged error.

The warrant issued under the act of 3d April 1792, entitled "an act for the sale of the vacant lands within this Commonwealth." The third section directs, that the warrant should contain a particular description of the land applied for; and by the fourth section, the deputy survey-

or, who should receive any warrant, was required to make a fair and clear entry of it in a book to be provided for that purpose, in order that all persons who apply for lands, may be informed of the warrant which have been issued. It was the duty of every person who applied for a warrant, to give a particular description of the land ; and if this was omitted, it could not be supplied by an entry in the book of the deputy surveyor. The law directs no entry of any thing but the warrant, and if an entry not authorized by law is made, nobody is bound to take notice of it. This court are therefore of opinion, that there is no error in the judge's charge on that point.

There is only one other assignment of error, of which we think it necessary to take notice. It is this ; that the president told the jury, that John Small's actual settlement in 1795, " will relate to his improvement in 1794."

As some difference seems to prevail among the gentlemen of the bar, respecting former decisions of judges of this court, sitting at Nisi Prius and in Circuit Courts, we think proper to express our sentiments explicitly on the subject in question. If an improvement is begun with an intent to make an immediate settlement, and prosecuted with due diligence, till a settlement is completed, the title relates to the commencement of the improvement. It is essential that there should be an intention of immediate settlement. An improvement made with a view of appropriating land for the purpose of sale, or of future settlement, is of no avail. The intent must be collected from the conduct of the person. If a small improvement is commenced, and a considerable delay takes place before there is any residence, it lies on the improver to account for it in a reasonable manner. Much will depend on the situation of the country, with respect to danger from an enemy, the difficulty or facility of procuring provisions, the health of the improver and his family, and a variety of circumstances, which must be judged of, as they are brought forward. It appears to us, that the president of the Court of Common Pleas, ought to have stated the law in this manner to the jury, and that he went too far in deciding, that the title of the plaintiff below commenced in 1794. Whether it commenced then, depended on his intent at the time he made his little improvement in that year, and on the reasonableness of the causes allege for the delay of residence. Of these things the jury should have been directed to judge ; and they should have been told, that according to their opinion on these points, the settlement would commence in 1794 or not. It is true, that the president in the conclusion of his charge told the jury, that if they thought differently from him, they might find differently. But having told them what the law

was, it became their duty to take it so, and not to differ from him ; because the court are to decide the law, and the jury the fact.

We are therefore of opinion, that the judgment of the Court of Common Pleas be reversed, and a *venire facias de novo* be awarded. Concerning the merits of the cause, we think it improper to express any opinion.

Lessee of JONATHAN JONES *against* WILLIAM ANDERSON and MATTHEW ANDERSON.

The adverse possession of an actual settler, within the time allowed to the warrantee to make his settlement is *ipso facto*, a prevention. The entry of an actual settler is not congeable on a supposed default without a vacating warrant or application, which must be taken out before suit brought, otherwise they cannot be admitted in evidence on the trial.

APPEAL from the decision of the Circuit Court of Mercer county. The cause was tried before the chief Justice on the 3d October 1807.

The plaintiff claimed under a warrant in the name of his lessor for 400 acres of land, north and west of the river Ohio, on the waters of Big Beaver creek, dated 21st April 1794 ; upon which a survey was made of 400 acres and 16 perches by Benjamin Stokely, deputy surveyor, on the 25th May 1795, including the lands in question. He further gave in evidence, that William M'Millan had built a cabin on the land in May 1796, as an actual settler, and that a possession adverse to the warrant right had continued ever since ; but he gave no evidence of any entry or claim by his lessor, or any other person, made of the defendants or those under whom they held, until the commencement of this ejectment on the 15th February 1802 ; or that any force or threats were used, which might deter or prevent them from making an actual settlement on the land.

The defendants offered in evidence an application without date, (but which was agreed to have been made after 1802,) in the name of William Anderson, for a vacating warrant, accompanied by affidavits, that the settlement was commenced in May 1796, interest to be computed from the 1st May 1796 ; and likewise offered to prove, that the settlement had begun in 1795, and was prosecuted in 1796. But the chief justice rejected them ; because the intention of the act of 3d April 1804, (6 St. Laws 511,) evidently was, to put the application for a vacating warrant on the same footing with the vacating warrant itself ; and inasmuch as the latter could not be given in evidence if obtained after the suit brought, neither could the former be received. And as to the second point, it had often been decided, that a party having fixed the commencement of his improvement by his application to the land office, was concluded thereby, and could not afterwards be permitted to carry it further back.

The chief justice charged the jury, that as the defendants, or those under whom they claimed had entered into possession of the premises within the time allowed by law for the making of his settlement, and had obtained no vacating warrant or entered an application in lieu thereof, previous to the commencement of the suit, the plaintiff was entitled to recover ; but the jury found for the defendants. On motion, a new trial was awarded ; and thereupon this appeal was brought.

Messrs. S. B. Foster and A. W. Foster, now argued in support of the appeal. We wish not to unhinge any decision of the Supreme Court, nor any point fairly deducible from their decisions. But the opinion of any single judge is examinable, and even of the court collectively, when their resolutions did not proceed on the very point before them. Two sets of purchasers were contemplated by the act of 3d April 1792, 3 St. Laws 209. But the law regarded more the settlement of the country, than the payment of money into the state coffers. It was intended that the law should carry itself through, by its own operation. Under the 9th section in default of actual settlement and residence by warrantees, new warrants might be granted to other actual settlers. And under the 10th section actual settlers not applying for warrants for ten years, other warrants might issue. The words of the law are direct and plain, that the commonwealth might lawfully issue new warrants to other actual settlers which evidently implies a right in them to take possession, on the default of warrantees. But all doubt is removed by the 2d section of the act of 22d April 1794, 3 Dall. St. Laws 591, which provides, that no warrant should issue after 15 June then next, “ except in favor of persons claiming the same by virtue of some settlement and improvement being made thereupon.”

It will not be denied, that a plaintiff in ejectment can only succeed by the goodness of his own title. How then has this plaintiff entitled himself ? The actual settlement and residence on these lands, was a condition precedent on the part of Jones, before his complete title vested.

If the condition was subsequent, the proviso in the 9th section was wholly unnecessary. .

Conditions precedent, must be strictly performed, to make the state vest ; and though become impossible even by the act of God, the estate will not vest. 4 Dall. 242. If one contract, he must do what in him lies, to perform his contract ; and nothing else will excuse him. Instead of showing force or threats made use of by the defendants, or those under whom they claim, deterring Jones from making his settlement and residence, it is not insinuated, that he ever made any demand of

any of them, or set up any claim thereto, until he brought this ejectment. The law might have been in his favor, if he had commenced his suit, while he had right in him to the exclusive possession. But that time is long past. The proviso in the 9th section of the act of 3d April 1792, only goes to a prevention by force of arms of the enemies of the United States and not of individuals. But if the latter should be held to be within the meaning of the legislature, it surely ought to be fully proved, and submitted as a fact to be judged of by the jury, whether the warrantee was really obstructed and deterred from taking possession. There can be no privity between the actual settler and warrantee, so as to make the settlement and residence of the former enure to the benefit of the latter.

Judge Washington asserted in *Heidekopper v. Douglass*, that a settler might enter on lands granted by warrant, where the conditions of actual settlement and residence had not been complied with, without taking out a vacating warrant. But admitting that the entry of the defendants was illegal in the first instance, the defect was cured by the provisions of the act of 3d April 1804. 6 St. Laws 511. It is admitted to have been decided in the state Circuit Courts, that the commonwealth only could take advantage of the condition broken. But here there was no estate to forfeit, the interest of the warrantee being wholly extinguished and gone. In construing a law, the pre-existing mischief and remedy are to be duly considered. It was well known, that a multitude of suits had been brought by warrantees, and the legislature was not ignorant of the opinions delivered in courts of justice, as to entries for conditions broken. The law was therefore intended to prevent litigation and circuitry of action, though the words of it are not closely logical. The applications of actual settlers are made equivalent to vacating warrants on the trial of all suits between warrantees and actual settlers, brought or to be brought. The expressions refer to all cases of application made before the trial of the suits, and the expressions, that the actual settler shall be permitted to plead and make proof of his improvement and residence, as fully and with equal force and effect as if such settler had obtained a vacating warrant," clearly show, that actual settlers shall be allowed to go into a full defence, when they have entered their applications. It is a substantive independent clause in their favor; but the construction set up on the part of the plaintiff defeats the plain meaning of the law. It was objected on the trial, that our construction changes the rules of evidence. But an alteration of the law necessarily must vary those rules. It was further said, that we place a person without a warrant in a better situation, than if he had a warrant. It is not so. Both are placed on the same footing. The privilege of a

full defence is given to the party as an actual settler; and the words are, "on the trial of all suits *brought or to be brought*," &c.

Messrs Semple and Baldwin answered on the part of the plaintiff. We have been taught to consider the adjudications of this court, after mature consideration, as binding and conclusive on the questions determined by them. Repeated decisions of the judges of this court, at Nisi Prius, in the Circuit Courts and in Bank, have fully established the principle, that a warrantee is legally entitled to two years after the ratification of general Wayne's treaty with the Indians, which took place on the 23d December 1797, in order to make his settlement, and that no other person could lawfully enter upon lands so granted. Here the defendants, or those under whom they hold, illegally took possession of the premises in May 1796, and withheld them from Jones, and it has been gravely contended, that their tortious entry is mellowed into right! If it was even admitted, that actual settlers might enter for the condition broken by the warrantees, on their default, this is not that case; because the warrantee was in no default until the 23d December 1797, when Indian hostilities had ceased, and peace was established. But the law is not so. The only seasonable construction which can be put on the words of the 9th section of the act of the 3d April 1792, of granting warrants to other actual settlers, is to other persons who should be desirous of becoming actual settlers; and so have been the decisions. Why was the mode of forfeiture prescribed by the legislature on the defaults of warrantee, if individuals could assume to themselves the right of judging in those instances wherein they were immediately interested? It is true, the act of 22d April 1794, was intended to favor settlers in general, but not to effect the rights which grew out of the act of April 1792. The 4th section of the law of 2d April 1802, shut up the land office as to granting new warrants for lands, for which warrants had before issued, with certain provisions. 5 St. Laws 159.

The actual settler, who has unlawfully taken possession of lands paid for by the warrantee, before any default made by him, offends against every principle of moral rectitude, when he urges his own injustice as a bar to the warrantee's recovery. His adverse possession is *ipso facto* a prevention of the warrantee from fulfilling the conditions of his grant. A demand of him to deliver up possession would be an idle ceremony, unattended with any good effects, perhaps followed by a breach of the peace. The ravages of an Indian enemy

are evanescent ; but the adherence of an actual settler to the soil is permanent and continued.

The act of 3d April 1804, will not aid the defendants. This very point was determined in the same manner by Mr. Justice Yeates, at a Circuit Court in Beaver county, in September 1806. The observations of the chief justice when this point was argued on the trial, are unanswerable. "The main object of the act of 3d April 1804, was to give actual settlers all the benefit of a vacating warrant, without the expense of it. For this purpose, applications, provided they had been filed before, or should be filed within two years after the passing of the act, confer all the advantages of a vacating warrant. Having declared this, the law goes on to say, "that on the trial of all suits brought or to be brought between warrantees and actual settlers, the actual settlers shall be permitted to plead and prove their improvement and residence, as fully and with equal force and effect, as if they had obtained a vacating warrant." This last part must be considered as connected with the former part of the law, and as authorizing the settler to prove his settlement in case of an application, in the same manner as if he had obtained a warrant. Unless it is limited to this construction, the part respecting applications is useless ; because no one would make an application if he could have all the benefit of his settlement without it. Besides, the application is limited to two years ; and unless the evidence is confined to cases of applications, the settlers would have a stronger case without an application, than with one, which is a manifest absurdity. Besides, the construction contended for by the defendants, would make the legislature guilty of partiality and injustice, which I will not suppose. It would have been partial and unjust to alter the general principles of evidence in this particular instance, and affect suits then depending by an *ex post facto* law. I construe it thus : whether the suit has been brought or shall be brought, if your application is filed, you shall have the same benefit, but not greater than if you had obtained a warrant, that is to say, if your application has been filed before suit brought, you shall avail yourself of it in this suit ; but if not until after such suit brought, you shall not avail yourself of it in this suit, though you may in another suit to be brought by yourself. It is probable, that in many suits depending at the time the act was passed, affidavits had been filed before the commencement of them, by virtue of the act of 2d April 1802, and this consideration throws light on the construction of the law in question. This construction satisfies every part of the law, and gives to the legislature that dignity and sense of justice which we hope will for ever invest

them. I am therefore of opinion, that the application and vacating warrant, obtained since bringing this suit, will not avail the defendants. Of course, they stand within the principle decided by the Supreme Court, in the case of the Commonwealth v. Tench Coxe, in the light of trespassers, because they entered before they had obtained a vacating warrant."

Yeates, J. delivered the opinion of himself, and of Mr. Justice Smith, as follows :

This is an appeal from the decision of the Circuit Court of Mercer county, wherein a verdict having passed for the defendants against the charge of the court, the chief justice awarded a new trial.

The merits of the case lie within a narrow compass. A warrant dated 21st April 1794, issued under the act of 3d April 1792, to the lessor of the plaintiff, for 400 acres of land, on the waters of Big Beaver creek, upon which a survey was duly made on the 25th May 1795, and afterwards returned, comprehending the premises in dispute.

In May 1796, a cabin was built on this land by an actual settler, adverse to the warrant right, and a possession in consequence thereof has been continued, under which the defendants deduce their title. This ejectment was commenced on the 15th February 1802, and William Anderson, one of the defendants, applied to the secretary of the land office for a vacating warrant subsequent thereto ; but his application was not permitted to be read in evidence to the jury. No other facts were disclosed on the trial.

The defendants have objected the want of a settlement and improvement on the part of Jonathan Jones, and have insisted that no entry or claim was made by him within the time limited for making thereof ; and that no force or threats were used by the defendants, or any person under whom they claim, preventing him from making his settlement agreeably to the law. Was it then necessary that the plaintiff should show this in evidence, before he was entitled to recover ?

In the case of the Commonwealth v. Tench Coxe, the majority of the court declared, that it did not lie in the mouths of men, who, supposing the warrants to be dead, by reason of the settlements not being within two years after their dates, had taken possession of the lands, or a part thereof, to object the want of settlement and improvement on the part of the warrantee. 4 Dall. 205. So on the feigned issue at Sunbury, it was agreed by the three judges then present, that if a person, under a pretence of being an actual settler, shall seat himself on lands previously warranted and surveyed, within the period allowed under a fair construction of the law, to the warrantee for mak-

ing his settlement, withhold the possession and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. *Id.* 242. If the party himself is the cause, wherefore the condition cannot be performed, he shall never take advantage of the non-performance. The same doctrine was asserted in this place in Hazard's lessee, *v.* Lowrey, in September term 1806, and again recognized by a majority of this court in Patterson's lessee *v.* Cochran, at the last term here, on an appeal from my decision in Beaver county. In the latter case the expressions of the court are very strong: "A defendant having hindered a warrantee from making a settlement, shall not be permitted to defend himself, because a settlement has not been made. There are many cases, in which it has been held contrary to equity and good conscience, and destructive of morality, to permit a defendant in ejectment to take advantage of a defect in the plaintiff's title. A man who has received land under a lease, is not permitted to controvert the title of his lessor. A mortgagee omits to record his mortgage, and yet if one purchases with notice thereof, he shall hold the land subject to the mortgage. It would be an outrage on society, a violation of the first principles of sound policy and good government, to permit a wrong doer to derive benefit from his own unlawful conduct."

We might reasonably suppose, that after three decisions on solemn argument in Bank, and one other at a special court directed by the legislature to ascertain the true construction of the law of 3d April 1792, this question would be at rest. We trust it will be again revived. Unless the rule of *stare decises* is adhered to in the administration of justice under a government of laws, all property must be rendered insecure.

If a warrantee is entitled to the exclusive possession of the land he has paid for, a person withholding the possession against him, obstructs and prevents him from making his settlement; he is the cause of non-performance of the condition. One must be little acquainted with the secret springs of the human heart, and not conversant in the history of the lands N. and W. of the rivers Ohio, Allegheny and Conowango creek, who would suppose that on the requisition of the warrantee, the actual settler would deliver up the possession of them. Can one solitary instance be produced of such obedience to the laws? Can it be presumeable then that such request would be attended with good effects? As to force or threats being indispensably necessary to be shown on the part of the warrantee, to have been used by the actual settler, the mild spirit of the law does not invite to adventures, which would naturally tend to a breach of the public peace. We

therefore conclude, that as between the litigant parties, the adverse possession is *ipso facto*, an illegal prevention.

It has been further objected, that the entry of the actual settler was congeable for the condition broken. The contrary doctrine was asserted by us, on full argument, in *Morris's lessee v. Neighman and Sheiner*, 4 Dall. 210, at the Circuit Court here, in May 1800, which was recognized in the *Commonwealth v. Coxe*, before cited, and what is now contended for, is contradicted by the plain express words of the act of 3d April 1792.

The provision of the act of 3d April 1804, 6 St. Laws 511, afford a strong legislative construction, that a vacating warrant, or some substitute therefor, was necessary in such a case. But this objection, if even sustainable as a general proposition, is not applicable to the present instance. The warrantee was entitled to a period of two years after the ratification of the treaty at Fort Grenville, which ended on 23d December 1797, wherein he might make his settlement. But instead of allowing him the full interval of two years, the unlawful entry was made upon his lands within the period of seventeen months, by those under whom the defendants claim, viz., in May 1796.

Lastly, it has been contended, that although no application was filed, or warrant of default issued in favor of the defendants, previous to their entry on the lands or previous to the commencement of this ejectment, yet it was offered to be shown in evidence, that an application for a vacating warrant was filed in the proper office for the land, by one of the defendants, previous to the trial which was overruled. The force of this objection depends on the true construction of the 1st section of the aforesaid act of 3d April 1804. "Such application entitles the applicant to all the privileges and benefits, that an original or vacating warrant would intitle him to"—but no more.

But as a warrant taken out after the commencement of this suit would not avail the defendants, neither would the application which is substituted therefor. To construe it otherwise, we must drop part of the expressions of the act, which we are not justified in doing; and moreover, we should detract from the honor and justice of the legislature thereby. We have not the smallest hesitation in declaring, that we concur with the chief justice in the construction he has put on this section; and I will only add, that I assigned the same meaning to it, at a Circuit Court in Beaver county in September 1806, in *Shippen's lessee v. Auchenbaugh*, upon argument. An appeal was had therein, which was afterwards dismissed, but no objection was made to the decision upon that point.

Upon the whole we are fully satisfied that there is strong rea-

sonable ground, and even certainty, to conclude, that justice has not been done by the verdict which had passed in this cause; that the plaintiff is entitled to a new trial, and that the judgment of the Circuit Court should be affirmed.

New trial awarded.

EDMUND MILNE, plaintiff in error *against* ALEXANDER CUMMINGS.

Recital in a deed by trustees, that one of them had refused to intermeddle with the trust, is no evidence of that fact. Joint-tenants must join in ejectment.

EJECTMENT. Writ of error to the Common Pleas of Somerset county. The cause was tried 31st August 1808, when two bills of exceptions were sealed by President Young, the substance whereof is as follows :

The plaintiff in support of the issue on his part, gave in evidence an application in the name of Thomas Mitchell, dated, &c.; a survey made thereon by Thomas Smith, D. S. on the, &c.; a deed poll by the said Mitchell to John Vanderen, dated, &c.; a deed from the said Vanderer to John Hazlewood, Josiah Hewes, Edmund Milne and Samuel Garrigues, in trust, dated, &c., and a patent to the said grantees, in trust dated, &c., and showed in testimony that the said John Hazlewood was dead. He then offered in evidence a deed from Edmund Milne and Samuel Garrigues, two of the trustees, to John Clarkson, dated, &c., which recited that the aforesaid Josiah Hewes had refused to intermeddle with the trust, but the court would not permit the same to be given in evidence.

The plaintiff then contended, that a right to one undivided third part of the lands became vested in the plaintiff, under the foregoing deeds on the death of Hazlewood, that he was intitled to recover the same in this suit. But the court declared themselves of a different opinion, and so charged the jury. Whereupon, &c.

Mr. S. Riddle for the plaintiff in error contended, that as Hewes would not sustain the character of a trustee, and act under the deed, that the conveyance by the acting trustees was valid in law. But should it be otherwise Milne had a legal interest in one undivided third part of the lands, and intitled to a verdict for that proportion of the premises.

The court stopped Mr. Woods, who was proceeding to argue on the part of the defendant.

There is no legal evidence, from which we can infer that Hewes refused to intermeddle with the trust. On the contrary, the Yeates, Vol. IV.

insertion of his name in the patent, carries with it a very different aspect. If the fact really was, that he would not accept the trust, it would readily be susceptible of proof: but co-trustees inserting it in their deed, cannot be received as evidence of the fact: because otherwise a majority of the trustees might by such a recital remove one of their number from the trust, at their mere will and pleasure.

The deed from Vanderen conveyed no beneficial interest, but a mere trust, to be executed by all the grantees. They were joint tenants of the trust estate. In all real and mixed actions, joint tenants generally ought to join; for they have but one joint title and one freehold. Co. Dit. 189, a, 195 b. They must join in trespass, and other personal actions, where, they have a joint interest; as in debt or avowry for rent. 5 Mod. 73. Joint tenants are seized *per my and per tout* of the whole land and none of them have an exclusive interest therein. And if one joint tenant be sued, he may plead, that he holds jointly with such a one, who is alive and not named. Com. Dig. Abatement. F. 4. E. 9. It follows, that the Court of Common Pleas were right in their decisions upon both points, and their judgment must be affirmed. See 5 Espin. Rep. 151. S. C. 5 East 491.

I have thus far, faithfully reported the several decisions in the Supreme Court, since I came on the bench in April 1791. Mr. Binney having begun to publish his reports, chiefly of cases in the Eastern District, I do not feel the same necessity of reporting the resolutions in that district, as formerly appeared to me. But I shall proceed in reporting the decisions in the other districts; while I have leisure for so doing.

NOTE.—Most of the cases in the author's manuscript, within the period of this volume, having been reported in the first and second volumes of Mr. Binney's Reports, such cases only, as are not contained in Mr. Binney's work are now offered to the public. All the subsequent cases, one of little importance excepted, having been already published, it becomes expedient to close these reports with the September Term of the Western District 1808.

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A statute cannot be repealed by non-user. 181

The 5th section of the act of congress of 8d March 1797, directing that "debts due to the United States, shall be first satisfied," does not extend to cases where a particular state has a lie. 251

The certificate of a judge authenticating a judgment in another state, needs no stamp under the act of congress of 9th July 1797, and should be read in evidence. 396

ACTUAL SETTLEMENT. (See Land.) ADMINISTRATORS. (See Executors.)

Administrator cannot agree to a levy by sheriff on part of a tract of land, since the act of 1705, nor since the act of March 1806. 443

Executors or administrators cannot vary the rights of creditors as to their shares of the assets. 479

ADMIRALTY.

The jurisdiction of the admiralty is confined to offences on the high sea. 125

AGENT.

If a survey is fairly made without the application of the owner, the surveyor acts as his agents, and his acts are binding on him. 107

The declarations of an agent may be given in evidence to corroborate or discredit other declarations which have been proved; but what he has said, not acting in his agency cannot be received to establish any independent fact. 446

AGREEMENT CONTRACT. (See Deed. No. 6.)

The court will not lend its aid to enforce a contract between a foreigner and a citizen, whereby vessels are bought and equipped, registered and navigated in the name of the latter and for the use of the former in violation of the laws of the U. S.; 24

Courts of justice will not enforce illegal contracts, or such as contravene the principles of public national policy; and therefore will not aid an agreement for the sale of lands under the Connecticut title, adverse to this state, made after the intrusion act passed on the 11th April 1795. 84

AMENDMENT, JEOFAIL

The court will not amend the verdict of the jury, unless on sure grounds. Nor will they amend the damages laid in the plaintiff's declaration after verdict, without sending the cause to a new trial. 1

Capias issued against two partners, one is taken, and the other returned N. E. L. A general *narr.* is filed against both as on a joint contract, pleas in bar put in, the suit referred and exception taken to the report on its merits, the informality in the declaration is cured. 129

Summons against two not served as to one, and as to the other who appeared, removed by *hab. cor.* into the Circuit Court; *narr.* against him only who appeared, and pleas in bar put in; the jury were sworn as to both defendants. Held to be aided by the verdict. 130

Erroneous teste of a *fi. fa.* by clerk, tho' executed, is amendable. 185

Teste and return days of *fi. fa.* executed amended by the *præcipe.* 205

The court will not permit the plaintiff to enter his replication and join the issues under the arbitration act, after the jury are sworn, without the consent of the defendant. 347

The court will permit a plaintiff to amend his *narr.* though under a rule for trial or *non pros*; but not for the purposes of delay, or to vary the nature of his claim, under the arbitration act. 868

A defendant being a freeholder, and craving stay of execution after judgment, aids an error in the service of the summons. *Semb.* 878

Inquisition on a writ of inquiry, amendable. 871

The statutes of Jeofaile cure errors in form, when the defendant pleads in chief and a trial has been had on the merits. 420

Many faults in pleading are cured by verdict. If a declaration contains a substantive cause of action, it will be aided tho' informal. 423

Where the substantial merits of a case have been tried on a feigned issue, the court will amend a clerical error, though error brought. 479

An amendment will not be granted, which gives the plaintiff, a new substantive ground of action, and takes from defendant the right of pleading the act of limitations. 507

Where a judgment of the Common Pleas has been reversed on error, but the record not remitted, nor a *ven. fa. de novo* awarded, and there has been a trial on the merits in C. B. the court will order those rules to be entered *nunc pro tunc* to support the verdict. 517

If there are more than four days between the date of the justice's warrant and return, in proceedings between landlord and tenant, it is cured by the tenants appearance, and making defence. 523

Recognizance of bail in error, amended after judgment affirmed. 559

APPEAL.

Where a point has been determined by the Circuit Court, it can only come before the Supreme Court in Bank, upon appeal. 184

An appeal from the Circuit Court will be received, tho' the record be not filed until the first day of the term, after the court have risen, if reasonable efforts have been made to file it in due time. 284

Record on appeal from the Circuit Court filed in the afternoon of the first day of the term. Appeal dismissed. 240

The proceedings on appeal from the Circuit Court may be filed on the first day of the term in bank before the court has begun to sit, but not after, unless on special grounds. 511

Where an appeal from the Circuit Court is given to the next term, it means the term after the termination of the Circuit Court. 512

Agreement to argue a case before the judges of the Circuit Court and their opinion to be conclusive, if the agreement should come on before one judge of the Circuit Court by mutual consent, upon a change of the judiciary system, no appeal will lie to the Supreme Court, from the decision of such single judge. 551

ARBITRATION. AWARD. (See Referees.)

To impeach an award for mistake, the party must make out a clear case. The court will not examine the referees as to the minutiae of a disputed account. 248

Awards may be set aside for error in law, or manifest error in fact. 456

ASSETS. (See Administrator. Executor.)

ASSIGNMENT.

In a suit on a bond assigned, an interposing equity between an obligee and his assignee cannot be tried, where there has been no fraud, and the debt is justly due. 871

ASTUMPSIT. ACTIONS ON THE CASE.

Anything may be given in evidence to show that the plaintiff has no right to recover, and even a general release, under the plea of non-*assumpsit*. 849

Indebitatus assumpsit lies on an express as well as an implied promise, and where it is executed. But where it is executory, special *assumpsit* is the proper form of action. 853

On a plea of *non assumpsit* to an *insimul computasset*, evidence cannot be received that the defendant entered into agreement with a third person, trusting to the accuracy of books kept by the plaintiff, in which he was mistaken. 866

Indebitatus assumpsit will not lie for an insurance premium. 468

ATTACHMENT. (See Contempt.)**ATTACHMENT. FOREIGN AND DOMESTIC.**

In a foreign attachment, plaintiff may be called upon to show his cause of action, though after the third court. 6

Where one has lived and traded here for some years, and then sails as supercargo to the West Indies, carrying with him four-fifths of his property and making a partial assignment of one-fifth for the benefit of his creditors here, and there engages in new business, and is wholly silent in his letters about his return for nine months, his property is subject to foreign attachment, though he expressed an intention when he sailed, of returning in twelve or eighteen months at furthest. 241

On foreign attachments notice of the execution of a writ of inquiry, is put up in the prothonotary's office. 261

Foreign attachment set aside, a judgment having been obtained for the demand in a sister state, and an execution levied thereupon. 274

A share of bank stock attached, cannot be transferred on a judgment in foreign attachment. 377

B**BAIL.**

A recognizance of bail, when the party was fixed for the debt in his life-time, is entitled to a preference over bond and simple contract debts, within the act of 15 April, 1794. 93

Special bail may take up principal when attending court, or at any time he pleases. 123

No bail in slander or suit for libel, unless there be special damage, or the charge be of a gross nature. 193

One shall not be twice held to bail for the same cause of action, unless under very special circumstances. 206

Recognizances of bail do not bind lands from their caption, but from the judgments on *scire facias* brought. 308

BANKRUPTCY.

It is no objection against a bankrupt being a witness, that the names of his assignees were not substituted in the action, on his obtaining his certificate of conformity. 119

A *ca. sa.*, may be served on a bankrupt after the commissioners have signed his certificate of discharge, and before it is allowed by the district judge. 139

BANK STOCK.

A share of bank stock attached, cannot be transferred on a judgment in foreign attachment. 377

BARON & FEME.

Husband must be joined in suits brought for an injury done to the wife. 127

BILL OF EXCHANGE.

Bill of exchange drawn in South Carolina, on a person residing in any other of the United States, and protested, the holder of the bill is entitled to 10 per cent. damages, though the bill is not returned back to South Carolina. But where such bill is only given as an additional security to a bottomree bond, no damages are recoverable. 19

A suit may lie by an indorser against his indorsee, upon a special guaranty. 436

BILLS, BONDS. (See Action, No. 8.)

A bond on *non est factum*, must generally be proved by the subscribing witnesses, but if they cannot be had, or are unable to prove the execution, collateral testimony is admissible. 79

On the dissolution of a partnership, one partner gives a bond to the other to pay off the company's debts, and indemnify him with surety; which is afterwards assigned to trustees for the use of the creditors. Held on demurrer, that the bond may be well sued in the name of the partner for the use of the creditors. 170

Where a bond under the plea of payment is meant to be avoided for a total want of consideration, notice of the special matter must be given to the adverse party. 561

BRIDGE.

To make a bridge a county charge, it must appear by the report of the viewers, that five of them had viewed the place, and that such bridge was necessary. 484

C

CASE, ACTIONS ON THE. (See Assumpsit.)

CERTIORARI.

A *certiorari* to remove a road, must set out its beginning and ending, otherwise it will be quashed. 433

After certiorari read and allowed, there can be no further proceedings in the court below. 560

CITY LOTS.

By a general deed made in 1704, by first purchasers of 5000 acres, with the appurtenances, city lots incident thereto, though previously surveyed, will pass together with liberty lands, unless a contrary intention can be shown. 142

COMMISSION TO EXAMINE WITNESSES.

A commission to examine witnesses in which parties have joined, though the rule on which it was grounded was not entered on the docket, the deposition taken under it will be received in evidence, the 37th rule of practice of the Supreme Court notwithstanding. 349

Depositions taken under a commission not received in evidence, notice of filing the interrogatories not being served on the adverse party at least 15 days before the issuing the commission. 429

COMPTROLLER GENERAL.

Settlements of a public account, entered in the books of the comptroller general, and register general, create a lien on all the real estate of the debtor within the state. 6

A payment by an auctioneer to the Comptroller General, is not valid. It ought to be the state treasurer. 207

CONSTITUTION.

A justice of the peace commissioned within a certain district and county, cannot act under his former appointment upon a division of the county, if he shall reside in the new county, tho' the district remains in it entire. 399

CONTEMPT.

An attachment will issue against a member of congress, for a contempt in not attending under 3 subpoena, if he is not attending congress, or going to, or returning from congress. 347

CONTRACT. COURT FOREIGN, LEX LOCI. (See Agreement.)

Foreign attachment set aside, a judgment having been obtained for the demand in a sister state, and an execution levied thereupon. 274

COVENANT.

Where there is a covenant on the part of the grantees to pay the ground rent free and clear of all assessments, they are not allowed to deduct the same from the rents due to the ground landlord. 386

CREDITOR. (See Debtor and Creditors.)

D

DAMAGES.

Bills of exchange drawn in South Carolina, on a person residing in any other part of the United States, and protested, the holder of the bill is entitled to 10 per cent. damages, though the bill is not returned back to South Carolina. But where such bill is only given as an additional security to a bottomree bond, no damages are recoverable. 19

Rule of estimating damages where a negro has been sold as a slave, and afterward proves to be a freeman. 109

DEBTOR AND CREDITOR.

The creditor of one partner is entitled to levy on the joint stock, but subject to the joint debts of the partnership. 477

Where goods levied have not been removed by the sheriff the creditor loses his lien, if suffering them to remain in the possession of the debtor, has given him a false credit. ib

Executors and administrators cannot vary the rights of creditors as to their shares of the assets. 479

A creditor is not bound to sue on a bond when the same becomes due, under the penalty of losing the surety therein. 518

DECEIT.

In deceit, on the swap of horses, the whole transaction should be received in evidence. 522

DECLARATION.

What counts may be joined in the same declaration. 109

If a declaration contains a substantive cause of action it will be aided, though informal. 423

DEEDS.

A deed without any consideration expressed in the body of it, but with a receipt by the grantor, for 250 specie, in full of the consideration money, is sufficient to pass the land. 95

A fraudulent deed, though void against creditors, is good as a voluntary deed, between the parties. ib

By a general deed in 1704 to first purchasers of 5000 acres, city lots will pass as *appurtenant*. 142

The real time of execution of a deed may be shown by parol testimony. When a deed is antedated the burden of proof of the time of its execution lies on the party claiming under it. 278

The declarations of a grantee, after the execution of the deed, that he had paid nothing for it, not admissible in evidence. Such deed is good against the party, tho' void against creditors. 280

Articles of agreement for the sale of lands, whereby it was agreed that on payment of money at a future day, the vendee should receive a deed, held not sufficient to divest the legal estate, though the words *do grant, bargain and sell*, were inserted therein, and bonds given for the purchase money. 295

DEFALCATION. SET-OFF.

Where there is a covenant on the part of the grantees, to pay the ground rent, free and clear of all assessments, they are not allowed to deduct the same from the rents due to the ground landlord. 386

A set off must be between the same parties. 461

DEMURRER TO EVIDENCE.

A special verdict must find the facts distinctly; but on a demurrer to evidence, the evidence only is stated, yet if it be by parol, and the effect of it be doubtful, all the facts which the evidence tended to prove, or which the jury might infer from it, are thereby admitted. The party may insist at the trial that his adversary demurring shall confess such facts on record: But if this is not done, the court will consider every thing as admitted, which the judge who tried the cause would have done, in order to compel a joinder in demurrer. 54

DEVISE.

By a devise to testator's wife, of all the benefits of all his real estate until his children come of age, grain growing in the ground at the time of the testator's death, passes to the widow. 23

A will beginning "touching all my worldly effects, both real and personal, I give as follows," and then after directing the payment of his debts and funeral expenses, and bequeathing a legacy of 10*l*. he devises to L. "all the rest of his estate, both real and personal, to be at her own disposal, as she may think proper, all plate, moneys, goods and chattels," &c. These words pass a fee simple in the lands. 179

DISTRIBUTION. DISTRIBUTIVE SHARE.

When a judgment had been obtained by a father-in-law, against his son-in-law, on a bond, and all the visible estate of the latter has been sold by the sheriff, leaving a considerable balance due, and the former has died intestate, and his lands have been valued in the Orphan's Court, the court will direct, that the distributive share of the latter, in right of his wife, of the valuation, be credited on the judgment obtained against him. 74

DIVORCE.

Court will not suffer a juror to be withdrawn on the trial of an issue of adultery, on a libel for a divorce, without consent. 244

It is not indispensably necessary to name the *particeps criminis* in a libel for a divorce, founded on a supposed adultery. ib

Where such libel states the adultery to be committed with E. P. and other lewd women unknown, the times and places and attendant circumstances should be specified in a written notice before trial, without requisition; and if their names should become known, the same should also be specified. The party failing herein, should be confined in the evidence, to acts of adultery committed with E. P. ib

DOWER.

The right of dower in the widow attaches immediately on the death of her husband and she may be endowed temporarily, tho' there be a deficiency of personal estate to pay debts, and tho' upon a sale of part of the lands her dower will decrease in proportion. 526

E

EJECTMENT.

A plaintiff under special circumstances, may recover in ejectment, though the survey, returned excludes the lands in question, if the survey of the lands be found by the jury. 38

Ejectment may lie for an island, without a survey; so where the adversary forcibly prevents the survey. 107

Though the plaintiff in ejectment cannot compel two defendants having several interests, to submit to joint trial, yet the latter may conclude themselves by a joint appearance and plea. 134

Where one is in possession of lands at the time of an ejectment served, and appears and pleads generally he cannot upon trial, narrow his defence to part of the lands in his possessions; but the jury will give a verdict as to the whole. 292

Plaintiff in ejectment shall recover according to his title when suit was brought; but if pending the suit, his title is divested, he may proceed for damages and costs. 382

In ejectment, judgment for want of an appearance, must be against the casual ejector. 560

Joint-tenants must join in ejectment. 577

ERROR, WRIT OF.

In replevin by P. L. against I. W. the jury who tried the cause were returned by I. W. The court on error cannot presume that the defendant and sheriff are the same person, unless it appears on the record. But if it so appeared, and the plaintiff did not challenge the array, he comes too late to assign it for error. 48

A writ of error in a criminal case is *ex gratia*, but it will not lie until final judgment entered. 319

After judgment in Supreme Court removed by writ of error to the Court of Errors and Appeals and there *non proceesed* upon a suggestion filed a rule will not be granted to plead thereto. 385

A writ of error not returned to the term to which the same was returnable, the suit will not be dismissed on that account. 418

Where such writ has issued shortly before its return, and the record has been removed, the court will presume that it was presented during the sitting of the court to which it was directed. 418

It cannot be assumed for error, that the adverse party has renounced a matter agreed on for his own benefit. 479

If damages under 40s. be recovered in slander, and judgment entered for costs, on error brought by the defendant below, the judgment will be reversed *in toto*, and and restitution and *venire facias de novo* awarded. 546

Record remitted to the Common Pleas, whereupon *nul tiel* record legal evidence has been overruled, on a writ of error. 497

ESCAPE.

In debt against a sheriff for an escape, parol evidence that he did not take the prisoner until after the return day of the *ca. sa.* which was returned "in custody," is not admissible 47

In debt for an escape, on *ca. sa.* the jury must find the whole debt and costs. ib

The statutes of Westm. 2, 13 Ewd. 1, c. 11, and 1 Rich. 2, c. 12. concerning escapes, extend to Pennsylvania. ib

ESTATE, REAL AND PERSONAL.

Heir at law may be estopped by his acts in a court of record from asserting his right and thereby convert real into personal estate. 85

ESTOPPEL. (See Estates, 1. Heir, 1.)

One claiming an improvement, and taking out a warrant including the same, and obtaining a survey, is in general concluded by the lines thereof, but under certain circumstances, this rule does not seem to hold. 300

EVIDENCE.

In debt against a sheriff for an escape, parol evidence that he did not take the prisoner until after the return day of the *ca. sa.* which was returned "in custody," is not admissible. 47

A bond, on *non est factum*, must generally be proved by the subscribing witnesses; but if they cannot be had, or are unable to prove the execution, collateral testimony is admissible. 79

In debt *qui tam*. on the act against usury, the usurious contract in point of date, must be proved as laid, or the variance is fatal. 99

Parol evidence of the declarations of a deputy surveyor, that he had received money to take out a warrant which had been burnt in his house, but would soon take out the warrant, not admissible. 100

Protest of a master of a ship, evidence on a policy of insurance. 115

A warrant and survey in the admiralty, good evidence. ib

Recitals in a patent of sundry transfers of a location, no evidence against a prior patentee of the same lands. 262

Improvements made on lands after an early descriptive adverse warrant and a survey returned, cannot be received in evidence against a distant owner. 266

The notarial copy of an agreement made in Philadelphia, respecting the loading of a vessel insured, the original being admitted to be in the hands of an agent abroad, not permitted as evidence against the underwriters. 275

The real time of execution of a deed may be shown by parol testimony. When a deed is antedated, the burden of proof of the time of its execution lies on the party claiming under it. 278

The declarations of a grantee, after the execution of the deed, that he had paid nothing for it, not admissible in evidence, such deed being good against the party, though void against creditors. 280

A deposition taken on a *caveat* before the Board of Property, not allowed in evidence though the witness was cross-examined by the adverse party, and is since dead. 295

A legatee under a will may give evidence to impeach the testator's deed, if she has no remedy for the recovery of her legacy payable out of the lands. 299

In trespass *quare clausum fregit*, an unofficial private survey is evidence to show the extent of the party's possession. 317

An application in nature of a vacating warrant, filed under the act of 8d April 1804, since the ejectment brought, not received in evidence. 328

A survey made for an actual settler, though out of possession will be received in evidence. 330

- Deposition overruled, because it went among other things to prove the contents of another paper which was not proved to have been lost. 340
- Invoice book of an agent, not evidence of the sale and delivery of goods. 341
- Any thing may be given in evidence to show that plaintiff has no right to recover, and even a general release, under the plea of *non assumpsit*. 349
- The discharge of a debtor under the insolvent acts, is *prima facie* evidence of the service of notices on the creditors, but not conclusive. 352
- On a plea of non assumpsit to an *in simul computasset* evidence cannot be received, that the defendant entered into an agreement with a third person, trusting to the accuracy of books kept by the plaintiff, in which he was mistaken. 366
- The court will not presume anything against the proceedings of a justice of the peace. 373
- The certificate of a judge, authenticating a judgment in another state, needs no stamp under the act of congress of 9th July 1797, and should be read in evidence. 396
- A will proved by two witnesses, before a justice of the peace and registered, admitted in evidence. 413
- Plat of a survey made by the assistant of a deputy surveyor for his own benefit, not returned into the surveyor general's office nor signed by the deputy, found amongst the papers of such assistant after his death, cannot be read in evidence. 428
- Party applying for land, mentioning an improvement in his application, but not paying back interest from the time of its commencement, is mere matter of description; and evidence of improvements in such case will be overruled; but they may be received to show that the survey of the adverse party was invalid. 429
- Depositions taken under a commission, not received in evidence, notice of filing interrogatories not being served on the adverse party at least 15 days before the issuing the commission. ib
- The court will not presume anything against a judgment. 436
- The declarations of an agent may be given in evidence, to corroborate or discredit other declarations which have been proved; but what he has said not acting in his agency cannot be received to establish any independent fact. 446
- The report of referees, that the parties had dispensed with their being sworn, is *prima facie* evidence of its contents. 491
- Depositions of witnesses, who became interested at the time of trial, and were in full life, refused in evidence. 512
- To entitle a party to read depositions in evidence, tho' the witnesses have been cross-examined, it must appear that the requisites of the 24th rule of practice have been complied with. 520
- In deceit on the swap of horses, the whole transaction should be received in evidence. 522
- A paper subscribed by one of the parties, respecting the matter in controversy, should go to the jury. The court cannot say what influence it might have on their minds. 532
- A vacating warrant must be taken out before suit brought, otherwise it cannot be admitted in evidence on the trial. 569
- Recital in a deed by trustees, that one of them had refused to intermeddle with the trust, is no evidence of that fact. 577

EXECUTION.

- Sheriff is bound to sell the defendant's personal property before he can sell his lands, but he may proceed otherwise with the party's consent. 21
- It is not necessary to notify the defendant of the time and place of taking an inquisition on the lands levied on. Nor is the sheriff bound to levy on all the defendant's lands in his bailiwick, though he cannot cut up and divide a particular tract. ib
- Judgment entered 14th November 1803, in Philadelphia county *testatum a fi. fa.* to Montgomery county tested on the second return day of September term 1803, returnable on the last return day of December term following, founded on a *fi. fa.* not actually issued, held good. ib
- The Sheriff cannot sell more lands than have been levied upon. The inquisition cannot enlarge the levy, as returned. 111
- Quære Whether under a recovery at Nisi Prius in Philadelphia, four days before the term and defendants agreeing that a *testatum* may issue thereon immediately, within release of errors, such *testatum* tested the first day of the term, and returnable to the next term, is regular and valid against other execution creditors? 163

- A ca. sa.* may be served on a bankrupt, after the commissioners have signed his certificate of discharge, and before it allowed by the district judge. 139
- Erroneous *teste* of *fi. fa.* by the clerk, though executed is amendable. 185
- On a judgment had in term a *fi. fa.* cannot issue returnable to the last return day of the term, though goods are only levied thereon; *aliter*, of former, fictitious writs which may be filed of course. ib
- Where the plaintiff or his attorney deems it necessary to put an officer in the defendant's house to preserve the lien of an execution the withdrawing of him and suffering the defendant to go on as usual with his business, is a relinquishment of the execution. 194
- Tests* and return days of *fi. fa.* executed and amended by the *præcipe*. 205
- Part of a tract of land could not be levied on by a sheriff legally since the act of 1705 nor since the act of March 21, 1806. Nor could an administrator agree to such a levy. 443
- The creditor of one partner is entitled to levy on the joint stock, but subject to the joint debts of the partnership. 477
- Where goods levied have not removed by the sheriff, the creditor loses his lien, if suffering them to remain in the possession of the debtor, has given him a false credit. 477
- EXECUTOR. (See administrator.)
- Where a testator has become surety for one by bond, and a recovery is afterwards had against his executor named as his administrator, who pays the debt, he may recover the same against the principal, without naming himself in his representative character. 105
- In a suit brought against executors or administrators, an affidavit of defence is not necessary, by the practice of the court. 235
- Improvement rights in early times, have been considered as chattels, to many purposes and sold as such by executors and administrators. 300

F

FICTION. RELATION.

- Fictions of law shall work no wrong. 6
- As between creditors, the priority of their judgments is governed by the times of their entry, and not by relation to the preceding term. 197

FORCIBLE ENTRY.

- Indictment for a forcible entry into a messuage, tenement, and tract of land, without mentioning the quantity of acres, held bad after conviction. 326

FRAUD.

- A fraudulent deed, though void against creditors, is good, as a voluntary deed, between the parties. 95

FREIGHT. (See ship.)

H

HEIR.

- Heir at law may be estopped by his acts in a court of record, from asserting his right, and hereby convert real into personal estate. 35

HIGHWAY, ROADS.

- The act of 3d April 1804, respecting the streets and alleys in the Northern Liberties, and Southwark, alters and supplies the act of 6th April 1802, that the same shall not be deemed highways before compensation is made to the owner of the ground. 183
- The court will judge of a road from the record. The sessions should confirm the road most conducive to the public good. 372
- Semb.* That the clause in the act of 6th April 1802, that the improvements shall be noted, is only directory. ib
- Viewers returning the width of the road, is only surplusage. ib
- Under the act of 6th April 1802, respecting roads, proceedings under former laws thereby repealed, cannot be continued. 392

Confirmation of a road reversed, because the reviewers had not actually reviewed the road; and because one of the petitions for the road had been appointed a reviewer. 479

No general rule can be laid down, as to the definite points where a road shall begin and end, being necessary to be stated in the petition. *Id certum est quod certum reddi potest.*

A road leading from a certain house, into a public road, may be confirmed as a private road, though the viewers have not reported it as a private road. And the order of confirmation need not specify how it must be opened and kept in repair. 541

I

IMPROVEMENT. (See Lands.)

INDICTMENT.

It is discretionary with the court, whether they will quash any indictment, but they will not do it, unless in a clear case.

They will not quash an indictment for larceny, in stealing one promissory note. 69

INSOLVENT DEBTOR.

The discharge of a debtor under the insolvent act, is *prima facie* evidence of the service of notices on the creditors, but not conclusive. 352

One in custody under a ca. sa. gave bond with security to comply with the requisites of the insolvent law of 4th April 1798. Having petitioned and being opposed by his creditors, proceedings were stayed until the next August term, and a new bond given. At the August term, it was objected that he had not filed an inventory of his debts and credits with his petition, but the case was continued under advisement, and he did not surrender himself. In November term the court discharged the petition on account of irregularity; adjudged that the second bond was forfeited. 388

INSURANCE.

A vessel insured must in all respects be fit for the trade wherein she is employed, and the *onus probandi* of sea worthiness, generally lies on the insured: but where the loss is fairly attributable to sea damage, or any other unforeseen misfortune, the proof lies on the insurer who sets it up as a defence. 115

Protest of a master of a ship, evidence on a policy of insurance. ib

Warrant and survey in the admiralty, good evidence. ib

On a double insurance, the insured may apply to either set of underwriters at his election. If the first policy be open, and the other valued, and he cedes to the insurers on the open policy, as much as they insured, and obtains payment as for a total loss and he has short property on board, he shall only recover on the valued policy for the loss on the property he could cede on the same. 161

Indebitatus assumpsit will not lie for an insurance premium. *Samb.* A parol insurance is valid. 468

INTEREST, USURY.

In debt, *qui tam*, on the act against usury, the usurious contract in point of date, must be proved as laid, or the variance is fatal. 99

Bond conditioned for the payment of 740*l.* in seven years and the interest thereon yearly and every year; agreement indorsed thereon by the obligor that if any part of the interest should remain unpaid for the space of three months to allow the obligee lawful interest for the same from the end of the said three months until paid. The agreement may be enforced, and is not usurious. 220

In replevin, on the issue of rent in arrear, the jury ascertain the sum due to the avowant for rent, and are not confined to the value of the goods distrained: and in such case may allow interest from the time of the replevin sued out. 264

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- One cannot be an actual settler on two tracts of land, but his children if of sufficient age to reside on and cultivate the land, may be settlers. 534

Indulgence will be given to a settler, who quits his residence for a temporary purpose with intention of returning to it. ib

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As between creditors, the priority of their judgments is governed by the times of their entry, and not by relation to the perceding term. 197

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In replevin, on the issue of rent in arrear, the jury ascertain the sum due to the avowant for rent, and are not confined to the value of the goods distrained; and in such case may allow interest from the time of the replevin sued out. 264

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A legatee under a will may give evidence to impeach the testator's deed, if she has no remedy for the recovery of her legacy, payable out of the lands. 299

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THE END.

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